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What's in a Word? A Comparative Analysis of Article I, § 12 of the New York State Constitution and the Fourth Amendment to the United States Constitution as Interpreted by the New York Court of Appeals and the United States Supreme Court

Douglas Holden Wigdor

WHAT'S IN A WORD ? A COMPARATIVE ANALYSIS OF ARTICLE I, § 12 OF THE NEW YORK STATE CONSTITUTION AND THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS INTERPRETED BY THE NEW YORK COURT OF APPEALS AND THE UNITED STATES SUPREME COURT

Douglas Holden Wigdor*

INTRODUCTION

Article I, § 12 of the New York State Constitution provides that:

> The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

These fifty-four words of the New York State Constitution are identical to the United States Constitution's Fourth Amendment.[2]

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* Douglas Holden Wigdor is currently an Assistant District Attorney in Suffolk County, New York. He is assigned to the complex litigation/white-collar crime bureau. Mr. Wigdor received an A.B. from Washington University, St. Louis, Missouri, Cum Laude, 1990; a J.D. from Catholic University in 1993; and a Masters Degree in Politics from Oxford University, England in 1995. The views expressed herein are the author's and not necessarily those of the Suffolk County District Attorney's Office.

[1] N.Y. CONST. art. I, § 12.

[2] U.S. CONST. amend. IV. This provision states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation,

However, during the last two decades there has been an unprecedented divergence in the interpretation of those words by the New York Court of Appeals and by the United States Supreme Court. Although a state is free as a matter of its own state constitutional law to restrict police activity to a greater degree than the federal courts,[3] the preferred practice is one of uniformity where the constitutional language is identical. Despite the identical language between the first paragraph of Article I, § 12 of the New York State Constitution and the United States Constitution's Fourth Amendment, the New York Court of Appeals has disregarded the logic and analysis of the United States Supreme Court's interpretation of this area of criminal procedure. Basing its decisions on "independent state grounds," the New York Court of Appeals has granted broader individual rights than those mandated by the Supreme Court. This has restricted law enforcement techniques, investigations, and the prosecution of criminal defendants.

In many criminal prosecutions involving search and seizure issues, the New York Court of Appeals has broadened the scope of conduct that constitutes an impermissible search or seizure by the United States Supreme Court holding that the New York State Constitution affords its citizens greater rights than the Federal

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> and particularly describing the place to be searched, and the persons or things to be seized.

Id.

[3] *See* Oregon v. Hass, 420 U.S. 714, 719 (1975). In *Hess*, the Court stated that:

> [A] State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards . . . . But, of course, a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.

Id.; Cooper v. California, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the States power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so."); Sibron v. New York, 392 U.S. 40, 61 (1988) ("New York is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement.").

Constitution. Thus, a New York police officer who obeys the mandates of the United States Constitution's Fourth Amendment, may still be in violation of the New York State Constitution. As a result, numerous successful prosecutions for murder, drug sales, rape, and other felonies have been reversed by the highest court in New York as well as lower appellate courts following the Court of Appeals' precedent. It has been argued that in relation to the total number of criminal prosecutions, few criminal convictions are actually overturned by the New York appellate courts' interpretation of Article I, § 12. However, the decisions by the Court of Appeals in interpreting Article I, § 12 have a dramatic impact on all citizens of the State of New York.

A number of cases involving potential search and seizure issues have been hindered or curtailed prior to a criminal trial. In addition, numerous cases are plea bargained to lesser crimes and dramatically reduced sentences. The threat of a judge suppressing incriminating evidence has meant that otherwise strong criminal prosecutions have been pled. As a direct result of the Court of Appeals' interpretation of Article I, § 12, New York police under the guidance of county prosecutors, have limited their investigatory techniques in the fear that incriminating evidence may be suppressed at a later point in time. New York prosecutors are often left to explain to the police that while a search warrant for a particular investigatory technique would be permitted by the federal government, the laws in New York do not permit such investigations. Thus, many instances of criminal conduct go undetected while the gathering of incriminating evidence becomes more difficult.

The practical effect of these facts can not be precisely ascertained. One fact, however, is certain, New York prosecutors and New York police officers operate under a different set of rules than federal and state law enforcement agents that follow the Supreme Court's interpretation of the United States Constitution's Fourth Amendment. In response to concern by law abiding citizens of New York, (that the Court of Appeals has actually restricted their individual rights by undermining the effectiveness of law

enforcement and criminal prosecution), the New York State Senate[4] and Assembly[5] have proposed legislation that would mandate that Article I, § 12 and the Fourth Amendment be analyzed co-extensively. This pending legislation would prohibit the New York Court of Appeals from granting greater rights to citizens of New York based upon an independent state grounds analysis of Article I, § 12.

This article examines the divergence between the New York Court of Appeals and the Supreme Court in their respective analysis of Article 1, § 12 of the New York State Constitution and the Fourth Amendment to the United States Constitution. Specifically, this article provides an extensive comparative analysis of each area of search and seizure law where the New York Court of Appeals has decided, based upon independent state grounds, to grant citizens of New York greater rights than the Supreme Court. Each section of this article reviews the differences between the federal and New York standards. This article does not provide an analytical interpretation of "independent state constitutionalism," or its underlying rationale and principles; nor does this article provide a historical account of the New York State Constitution.[6]

The primary goal of this article is to pragmatically analyze the repercussions associated with the New York Court of Appeals' position of granting greater constitutional search and seizure protection than that of the Fourth Amendment to the United States Constitution. Thus, this article focuses on the practical ramifications confronted daily by law enforcement officers and prosecutors in New York due to the Court of Appeals' decision to grant extended rights beyond those already delineated by the United States Supreme Court.

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[4] *See* S. 219-6041, 2d Legis. Sess. (N.Y. 1996); S. 219-7041, 2d Legis. Sess. (N.Y. 1996); S. 219-7146, 2d Legis. Sess. (N.Y. 1996); S. 220-1584, Annual Legis. Sess. (N.Y. 1997).

[5] *See* A. 219-9195, 2d Legis. Sess. (N.Y. 1996); A. 219-9258, 2d Legis. Sess. (N.Y. 1996); A. 220-642, Annual Legis. Sess. (N.Y. 1997).

[6] *See* Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1 (1996).

Part I of this article discusses what constitutes a search and seizure.[7] It will become evident that the New York Court of Appeals has interpreted Article I, § 12 broader than the Supreme Court in its interpretation of the Fourth Amendment. Thus, numerous police tactics which the Supreme Court has held do not constitute a search and seizure, in fact do constitute a search and seizure in the State of New York. Part II of this article next considers probable cause under both the federal and state standards.[8] Since 1983, the Supreme Court has examined applications for search warrants based upon informants under the totality of the circumstances test. In contrast, New York has adhered to a more rigid standard which requires the search warrant to expressly state the basis of knowledge and the veracity of the informant. Part III of this article then examines the interaction between the First and Fourth Amendments.[9] It illustrates how search warrants for presumptively protected First Amendment material require a higher level of probable cause in New York than in the federal system. Part IV of this article reviews the area of automobile searches and seizures.[10] This area of the law demonstrates the hypertechnical analysis of the Court of Appeals as compared with the Supreme Court's cohesive frame-work. Part V and Part VI of this article scrutinize the divergence in analysis between the New York Court of Appeals and the Supreme Court in the searches of homes and businesses.[11] These sections demonstrate the difficulties law enforcement officers and prosecutors confront when attempting to search a suspect's home or a closely regulated business such as an automotive junkyard. Finally, Part VII examines the exclusionary rule and the "good-faith" exception and demonstrates how the New York Court of Appeals has refused to adopt this exception. The Court of Appeals believes that this exception would infringe upon the rights of New York citizens even though it presumes that the officer's conduct could not have been

[7] *See infra* notes 13-167 and accompanying text.
[8] *See infra* notes 168-197 and accompanying text.
[9] *See infra* notes 198-213 and accompanying text.
[10] *See infra* notes 214-262 and accompanying text.
[11] *See infra* notes 263-343 and accompanying text.

deterred.[12] Each section expresses the practical effect of New York's highest court's views on daily law enforcement and criminal prosecution. It appears that the New York Court of Appeals has disregarded the United States Supreme Court's interpretation of the Fourth Amendment, thus resulting in diminished law enforcement capabilities and reduced effectiveness in successful criminal prosecutions.

I. WHAT CONSTITUTES A SEARCH AND SEIZURE ?

The New York Court of Appeals has deviated from the standard used by the Supreme Court in determining whether a search and seizure has occurred and whether certain searches and seizures are reasonable. The Court of Appeals' interpretation of Article I, §12 of the New York State Constitution has restricted law enforcement techniques that have been held constitutional by the Supreme Court under the premise that the New York State Constitution affords greater rights to criminals than does the Fourth Amendment. This section analyzes five Supreme Court cases involving the Court's determination of what constitutes a search and seizure, and furthermore, what constitutes a "reasonable" search and seizure. With five separate Supreme Court cases as precedent, *United States v. Place*,[13] *Oliver v. United States*,[14] *Florida v. Bostick*,[15] *California v. Hodari D.*,[16] and *Minnesota v. Dickerson*,[17] the New York Court of Appeals restricted law enforcement techniques and disregarded Supreme Court analysis citing independent state grounds.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures."[18] Although the New York Constitution uses identical language to that of the Fourth Amendment, what constitutes a search and seizure under the Fourth

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[12] *See infra* notes 344-379 and accompanying text.
[13] 462 U.S. 696 (1983).
[14] 466 U.S. 170 (1984).
[15] 502 U.S. 429 (1991).
[16] 499 U.S. 621 (1991).
[17] 508 U.S. 366 (1993).
[18] U.S. CONST. amend. IV.

Amendment to the United States Constitution is very different from what constitutes a search and seizure under Article I, § 12 of the New York State Constitution. The New York Court of Appeals has dramatically diverged from the recognized principles enunciated and followed in the United States Supreme Court and other federal courts. The words "search" and "seizure" are terms of limitation. Thus, in order for the Fourth Amendment to be triggered, the evidence that is obtained must have been the result of a search or seizure. If the evidence obtained was the result of a search or seizure, the Fourth Amendment requires that such search or seizure be "reasonable."

For many years the Supreme Court held that a Fourth Amendment search only occurred when there was a physical intrusion into a "constitutionally protected area."[19] These areas are enumerated in the Fourth Amendment itself: "persons,"[20] "papers,"[21] and "effects."[22] What constitutes a search, however, changed with the decision in *Katz v. United States*.[23] In *Katz*, F.B.I. agents overheard Katz's telephone conversations by attaching an electronic listening and recording device to the exterior of a public telephone booth. The Court rejected characterizing the issue

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[19] Silverman v. United States, 365 U.S. 505, 506 (1961) (holding that a Fourth Amendment seizure occurred when police officers placed "a microphone with a spike about a foot long together with an amplifier, a power pack, and earphones" inside petitioner's heating system). The Court found that a heating system "[w]as an integral part of the premises occupied by the petitioners . . .[and the listening device was placed in the system] without their knowledge and without their consent." *Id.* at 511.

[20] *See also* Schmerber v. California, 384 U.S. 757, 767 (1966) ("Compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment . . . [s]uch testing procedures plainly constitute searches of 'persons.'").

[21] *See also Ex parte* Jackson, 96 U.S. 727, 735 (1877) ("[l]etters, or sealed packages subject to letter postage, without warrant, [cannot be opened and examined].").

[22] *See also* Preston v. United States, 376 U.S. 364, 366 (1964) (wherein officers found "caps, women's stockings (one with mouth and eye holes), rope, pillow slips, an illegally manufactured license plate equipped to be snapped over another plate, and other items.").

[23] 389 U.S. 347 (1967).

as "whether a public telephone booth is a constitutionally protected area."[24] The Court concluded that when the government heard and recorded Katz's words, they violated his privacy. The Court held that Katz had a justifiable expectation of privacy when he used the public telephone booth. Furthermore, society would recognize such an expectation as reasonable. Therefore, the government's activities constituted an unreasonable search within the meaning of the Fourth Amendment. Justice Harlan in his concurrence said that the defendant must have "exhibited an actual (subjective) expectation of privacy," and that expectation must be one "that society is prepared to recognize as 'reasonable'." [25]

Since *Katz,* it has been the law that the "[c]apacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."[26] A subjective expectation of privacy has been found to be legitimate if it is "one that society is prepared to recognize as reasonable."[27]

The Court has held that searches and seizures "[c]onducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment--subject only to a few specifically established and well delineated exceptions."[28] One such exception was recognized in *Terry v. Ohio*,[29] which held that "[w]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot" the officer may briefly stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions.[30]

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[24] *Id.* at 349.

[25] *Id.* at 361.

[26] Rakas v. Illinois, 439 U.S. 128, 143 (1978) (citing *Katz*, 389 U.S. at 353).

[27] *Katz,* 389 U.S. at 361.

[28] Thompson v. Louisiana, 469 U.S. 17, 19-20 (1984) (per curiam, quoting *Katz*, 389 U.S. at 357).

[29] 392 U.S. 1 (1967).

[30] *Id.* at 30. *See also* Adams v. Williams, 407 U.S. 143 (1972). In *Adams*, the Court relied on the principle set forth in *Terry* that a police officer may conduct a weapons search when an officer is justified in believing that the individual is armed and dangerous. *Id.* at 145-46.

Terry recognized a "narrowly drawn" exception to the probable cause requirement of the Fourth Amendment for certain seizures of the person that do not rise to the level of a full arrest. Therefore, although a *Terry* stop is a seizure, it does not require probable cause. Where the intrusion on the individual is minimal, and when law enforcement interests outweigh the privacy interests infringed in a *Terry* encounter, a stop based on an objectively reasonable suspicion, rather than upon probable cause, is consistent with the Fourth Amendment.

In *Terry*, the Court adopted a dual inquiry for evaluating the reasonableness of an investigative stop. Under this approach, the Court examines "whether the officer's action were justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[31] The Court's opinion stated that "[o]bviously, not all personal intercourse between policemen and citizens involves seizures of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred."[32] In *United States v. Mendenhall*,[33] the Court adopted a test to assess whether an individual has been seized. "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[34] The Court has held, for example, that the "threatening presence of several officers, the display of weapons, and uniformed attire" constitute an intimidating show of authority triggering Fourth Amendment analysis.

In *United States v. Place*,[35] the Supreme Court was confronted with the issue of whether the temporary detention of luggage for exposure to a trained narcotics detection dog, on the basis of reasonable suspicion, was a violation of the Fourth Amendment. While awaiting a ticket at the Miami International Airport for a trip

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[31] *Terry*, 392 U.S. at 20.
[32] *Id.* at 19 n.16.
[33] 446 U.S. 544 (1980).
[34] *Id.* at 554.
[35] 462 U.S. 696 (1983).

to New York, Raymond Place "aroused the suspicion of law enforcement officers."[36] Walking to the gate, Place was stopped by law enforcement agents and was asked to show identification. Additionally, Place was asked whether his two suitcases could be checked. While Place agreed, the agents chose not to search the luggage as the plane was about to depart. Place remarked that "he had recognized that [the agents] were police."[37] As a result, the agents looked at the address tags on the luggage and noticed that they had two separate addresses. The agents later discovered that neither address existed and that the phone number Place gave to the ticketing agent belonged to a different address located on the identical street. Based upon these observations, the agents notified the Drug Enforcement Administration [hereinafter "DEA"] in New York. Once at LaGuardia Airport in New York, Place was approached by DEA agents. Again, Place told the agents that "he knew they were cops and had spotted them as soon as he had deplaned."[38] The agents informed Place that they believed he may be a drug smuggler. Place responded that his bags had already been searched in Miami. Place refused to consent to the agents request to search his luggage. Thereafter, one of the agents told Place that they were going to take the luggage in order to obtain a warrant, and that he could come with them. Place refused. Approximately one and a half hours later, the agents arrived at Kennedy Airport where a trained narcotics detection dog gave a positive reaction to one of the two bags. As it was late on a Friday afternoon, the agents kept the luggage over the weekend, and on Monday morning, they secured a search warrant. The resulting search discovered 1,125 grams of cocaine.

After being indicted for possession of cocaine with intent to sell, Place moved to suppress the contraband, claiming that the warrantless seizure of the luggage violated his Fourth Amendment rights. The District Court held that Place's Fourth Amendment rights were not violated.[39] The United States Court of Appeals for

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[36] *Id.* at 698.
[37] *Id.*
[38] *Id.*
[39] United States v. Place, 498 F. Supp. 1217, 1228 (E.D.N.Y. 1980).

the Second Circuit reversed holding that *Terry* "justif[ied] a warrantless seizure of [the] baggage on less than probable cause and that reasonable suspicion [did] justify the investigatory stop of Place . . . [but] that the prolonged seizure of Place's baggage exceeded the permissible limits of a Terry-type investigative stop . . . ."[40]

The Supreme Court granted certiorari and Justice O'Connor, writing for a 6-3 majority, affirmed the Court of Appeals, holding that:

> [G]iven the enforcement problems associated with the detection of narcotics trafficking and the minimal intrusion that a properly limited detention would entail, we conclude that the Fourth Amendment does not prohibit such a detention. On the facts of this case, however, we hold that the police conduct exceeded the bounds of a permissible investigative detention of the luggage.[41]

Although the Court ruled that the specifics of this fact scenario were unreasonable given the length of the delay before subjecting the luggage to a canine sniff test, the decision is clearly favorable to law enforcement agents in that the Court held that *Terry* permits the brief detention of luggage based upon less than probable cause.[42]

The Court's analysis was based upon the proposition that when an individual's luggage is seized under the Fourth Amendment, with less than probable cause, a search cannot take place. The Court stated that "[i]f this investigative procedure is itself a search requiring probable cause, the initial seizure of respondent's luggage

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[40] *Place*, 462 U.S. at 700. *See* United States v. Place, 660 F.2d 44 (E.D.N.Y.1981).

[41] *Place*, 462 U.S. at 698.

[42] *Id.* at 706. The Court concluded that

> [W]hen an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.

Id.

for the purpose of subjecting it to the sniff test–no matter how brief–could not be justified on less than probable cause."[43] Therefore, since the Court had previously held that a person has a protected privacy interest under the Fourth Amendment in their personal luggage,[44] the Court concluded that a canine sniff is not considered a search[45] "within the meaning of the Fourth Amendment."[46] If the Court had concluded that a canine sniff were a search, it would logically follow, based upon Court precedent, that probable cause would be necessary to "search."

The Court's rationale in determining that a canine sniff was not a search was based upon the premise that it is *sui generis*. In other words, a canine sniff does not infringe upon an individual's right to privacy. A canine sniff does not require the luggage to be opened and it only detects the presence of narcotics. Justice O'Connor stated that, "despite the facts that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive

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[43] *Id.* at 706 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1967); United States v. Cortez, 449 U.S. 411, 421 (1981); United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975); Adams v. Williams, 407 U.S. 143, 146 (1972)).

[44] *See also* United States v. Chadwick, 433 U.S. 1, 11 (1976).

> In this case, important Fourth Amendment privacy interests were at stake. By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination . . . [t]here being no exigency, it was unreasonable for the government to conduct this search without the safeguards a judicial warrant provides.

Id.

[45] *Place*, 462 U.S. at 707. The Court stated:

> A 'canine sniff' . . . does not require opening the luggage . . . does not expose non-contraband items that otherwise would remain hidden from public view . . . [t]hus the manner in which information is obtained . . . is much less intrusive than a typical search.

Id.

[46] *Id.*

investigative methods."[47] The Court's finding that a canine sniff is not a search is essential in concluding that a seizure of luggage based upon reasonable suspicion, not probable cause, followed by a canine sniff, is not in violation of the Fourth Amendment. Any other finding would require law enforcement officials to obtain probable cause to search before submitting the luggage to a trained canine sniff. Additionally, the Court's ruling assists law enforcement where no reasonable suspicion or probable cause is attainable and where a trained canine detects the presence of contraband. Since a canine sniff is not considered by the Supreme Court to be a search, unless a seizure takes place, neither reasonable suspicion nor probable cause is necessary.

The New York Court of Appeals, in *People v. Dunn*,[48] refused to follow the Supreme Court's finding that a trained canine sniff is not a search. In *Dunn*, the police seized large quantities of cocaine and marijuana from Dunn's apartment after obtaining a search warrant based upon a positive canine sniff. After learning that controlled substances were being kept by Dunn in his apartment, the police obtained a trained canine and went to the common hallway outside Dunn's apartment. The dog reacted positively, and a search warrant was obtained. The only issue for the Court of Appeals was whether the evidence should be suppressed on the basis that the canine sniff violated Dunn's constitutional rights.

The court acknowledged that Dunn's Fourth Amendment rights were not violated, "in light of the rational adopted by the Supreme Court in *Place*."[49] The court, however, analyzed whether under Art. I, § 12, "[o]ur State Constitution provides greater protection."[50] The court justified their departure from the Supreme Court in one paragraph, stating that:

> [T]his Court has not hesitated to interpret article I, § 12 independently of its Federal counterpart when the analysis adopted by the Supreme Court in a given area has threatened to undercut the right of our citizens to be free

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[47] *Place*, 462 U.S. at 707.
[48] 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990).
[49] *Id.* at 23, 564 N.E.2d at 1056, 563 N.Y.S.2d at 390.
[50] *Id.* at 24, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391.

> from unreasonable government intrusions. Because we conclude that the *Place* analysis does just that, we decline to follow it.[51]

Thus, despite the fact that the Fourth Amendment and Article I, § 12 of the New York Constitution are worded identically, the Court of Appeals, without any historical analysis as to why the New York Constitution afforded these "greater" rights, decided not to follow the Supreme Court's decision in *Place*. The Court did, however, rely on scare tactics to conjure the image of state police searching everywhere and everything with trained dogs. Judge Titone stated that the divergence from the Supreme Court's opinion was necessary; "to hold otherwise, we believe would raise the specter of the police roaming indiscriminately through the corridors of public housing projects with trained dogs in search of drugs . . . [s]uch an Orwellian notion would be repugnant under our State Constitution."[52] Judge Titone's argument, however, was surely not presented in the fact scenario in *Dunn*. Law enforcement officers went to Dunn's apartment only *after* learning that contraband was in the apartment.[53] The practical effect of the decision in *Dunn* cannot be understated. *Dunn* now requires law enforcement officers to now have a founded suspicion before a proper canine sniff can be conducted. By holding that a canine sniff is a search, the Court of Appeals has made it more difficult for law enforcement officers to combat, for example, drugtrafficking.

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[51] *Id.* (citations omitted).

[52] *Id.* at 25-26, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392 (citations omitted).

[53] *Id.* at 25-27, 564 N.E.2d at 1058-59, 563 N.Y.S.2d at 392-93. Although the New York Court of Appeals found that the canine sniff is a "search," contrary to the Supreme Court's analysis, the court did not suppress the evidence in *Dunn*. The Court of Appeals created a new standard for search scenarios involving canines. It held that although a canine sniff is a search, only reasonable suspicion is necessary for such a search to take place. This new standard is inapposite of the long history of rulings by the Supreme Court which require probable cause when making a search. Instead of acknowledging that a canine sniff is not a search, the Court of Appeals held that a lesser standard is necessary for such a search to take place. Practically speaking, however, this standard will prove difficult for law enforcement officials.

Additionally, at a time when "home-made" explosives are being transported and sold underground and where toxic chemicals are being secreted in an effort to prevent detection, New York's highest court has limited a useful ally in the detection of these potentially harmful substances.

In *Oliver v. United States*,[54] the Court attempted to clarify the "open fields" doctrine. In 1924, the Court, by Justice Holmes in *Hester v. United States*,[55] held that it is not a violation of the Fourth Amendment for a law enforcement official to search a field without a search warrant or probable cause. In *Oliver*, two Kentucky State officers went to Oliver's home on a tip that he was farming marijuana.[56] Although, Oliver's farm had a locked gate with a "No Trespassing" sign, the officers walked around the gate along the road, and into the farm where they found a field of marijuana.[57] Oliver was indicted and a suppression hearing was granted by the District Court. The District Court, relying on *Katz*,[58] held that the evidence was the result of an illegal search because Oliver had a reasonable expectation of privacy in his farm. The Court of Appeals for the Sixth Circuit, sitting *en banc*, reversed the District Court, holding that an individual does not have a Fourth Amendment privacy interest in "open fields," despite the Court's holding in *Katz*. [59]

Similarly, in *State v. Thornton*,[60] two police officers acted on a tip that Thornton was growing marijuana. They went to the woods behind his home and saw a "No Trespassing" sign. They then walked along a path between his home and a neighboring home, until they reached a chicken wire fence enclosing a field of marijuana.[61] Based upon their observations, a search warrant was secured, and Thornton was arrested and indicted. The trial court suppressed the incriminating evidence and held the "open fields"

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[54] 466 U.S. 170 (1984).
[55] 265 U.S. 57 (1924).
[56] *Oliver*, 466 U.S. at 173.
[57] *Id.*
[58] *See supra* notes 23-27 and accompanying text.
[59] United States v. Oliver, 686 F.2d 356, 360 (6th Cir. 1982).
[60] 453 A.2d 489 (Me.1984).
[61] *Oliver*, 466 U.S. at 174.

doctrine inapplicable, on the theory that Thornton had a reasonable expectation of privacy in his fenced field.[62] The Maine Supreme Judicial Court upheld the trial court's decision,[63] finding that the police were not lawfully present on Thornton's property, thus holding the "open fields" doctrine inapplicable.

The Supreme Court granted certiorari in both cases[64] to clarify the Court's opinion in *Hester* in light of the Court's more recent decisions in *Katz* and its progeny. Justice Powell, writing for the Court's 6-3 majority, held that in both cases the warrantless searches of the fields were constitutional under the "open fields" doctrine. The Court based its decision on the premise that an individual cannot have a legitimate expectation of privacy in "activities conducted out of doors in fields, except in the area immediately surrounding the home."[65] The Court was of the opinion that society was not prepared to recognize a privacy interest in activities that occur in the open fields, even where signs are posted and fences are erected.

In *People v. Scott*,[66] the Court of Appeals was confronted with a fact scenario similar to that in *Oliver*, but reached a different conclusion. In *Scott*, a search warrant and eventual conviction was secured based upon observations made of the defendant's "open fields."[67] Scott's 165 acres of fields and woods were surrounded by "No Trespassing" signs.[68] However, a private citizen, who had

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[62] *Id.* at 175.

[63] *Thornton*, 453 A.2d 489.

[64] United States v. Oliver, 686 F.2d 356 (6th Cir. 1982), *cert. granted*, 459 U.S. 1168 (1983); Maine v. Thornton, 453 A.2d 489 (1984), *cert. granted*, 460 U.S. 1068 (1983).

[65] *Oliver*, 466 U.S. at 178.

[66] 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992), *consolidated on appeal with* People v. Keta. The Court of Appeals consolidated two cases in one opinion. The other case, People v. Keta, *infra* notes 332-335 and accompanying text, analyzed the constitutionality of administrative inspection of the vehicle dismantling business.

[67] *Id.* at 479, 593 N.E.2d at 1331, 583 N.Y.S.2d at 923. Scott's residence consisted of a mobile home with no utilities. Additionally, the marijuana that was eventually located was 300-400 yards away from the curtilage of the home.

[68] *Scott*, 79 N.Y.2d at 478, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922.

shot and followed a deer onto Scott's property, observed what he believed to be marijuana. Approximately one year later, the private citizen again entered the property and noticed the remnants of marijuana. Thereafter, he notified the police who requested that he take a sample from one of the plants located on the property. The local citizen complied, and two police officers went to Scott's property and confirmed the citizen's observation.[69] The trial court denied the defendant's motion to suppress, relying on the rationale established by the Supreme Court in *Oliver*. The Appellate Division affirmed, embracing the decision in *Oliver* and holding that the defendant had no legitimate expectation of privacy in an "uncultivated field away from the curtilage of any residential structure . . . ."[70]

The Court of Appeals in reversing the Appellate Division refused to adopt the standard in *Oliver* and held that the "*Oliver* majority's literal interpretation of the [Fourth] Amendment's language and its reliance on history to support it, [is of] little relevance . . . ."[71] The Court of Appeals, per Judge Hancock, stated that, "[w]e believe that under the law of this State the citizens are entitled to more protection. A constitutional rule which permits State agents to invade private lands for no reason at all–without permission and in outright disregard of the owner's efforts to maintain privacy by fencing or posting signs–is one that we cannot accept as adequately preserving fundamental rights of New York citizens."[72] Thus, the Court of Appeals held, based upon independent state constitutional grounds, that when an individual posts a "No Trespassing" sign around hundreds of acres of forest, woodland, or farm land, the "expectation that [his] privacy rights will be respected and that [he] will be free from unwanted intrusions is reasonable."[73] By broadening the constitutionally protected area around the home, the New York Court of Appeals has limited the ability of police to

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[69] *Id.* at 479, 593 N.E.2d at 1328, 583 N.Y.S.2d at 922.

[70] People v. Scott, 169 A.D.2d 1023, 1025, 565 N.Y.S.2d 576, 577 (3d Dep't 1991).

[71] *Scott*, 79 N.Y.2d at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927.

[72] *Id.*

[73] *Id.* at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

conduct non-warrant surveillance of large woodlands and farms where ongoing criminal activity may be suspected. In addition to the obvious effects of the *Scott* decision on the drug production business, the detection of environmental crimes will undoubtedly be curtailed due to the difficulty associated with obtaining a warrant to search for hazardous waste sites secreted in "open fields."

The question of whether a police encounter with an individual rises to the level of a "seizure" is an important issue for law enforcement officials who are conducting investigations. If a brief detention amounts to a seizure, the Fourth Amendment's proscriptions are triggered, and reasonable suspicion is necessary. Otherwise, any evidence obtained as a result of the seizure is likely to be suppressed. The Supreme Court and the New York Court of Appeals have diverged on the issue of what type of police conduct amounts to a seizure of an individual. In three separate cases, the Supreme Court has expanded the techniques of law enforcement officials in investigatory stops to combat the problems associated with narcotics and weapons. The Court of Appeals, however, has refused to follow the guidance of the Supreme Court, and has declined to adopt such measures.

In *Florida v. Bostick*,[74] for example, the Supreme Court was confronted with a customary practice of Florida Law enforcement officers in which they were allowed to board any bus, without articulable suspicion, ask passengers for their ticket and identification, and request consent to a search of their personal belongings. In *Bostick*, two officers boarded a bus in Fort Lauderdale that was in transit from Miami to Atlanta.[75] The officers were in full uniform and were carrying their guns in a zip-lock pouch. The officers admittedly had no probable cause or reasonable suspicion when they boarded the bus; however, once on the bus, they asked Bostick for his identification and his ticket.[76] The ticket and identification matched, but the officers told Bostick that they were narcotics agents looking for illegal drugs, and

[74] 501 U.S. 429 (1991).
[75] *Id.* at 431.
[76] *Id.*

requested consent to search his luggage.[77] Although the officers informed Bostick that he had the right to refuse to consent,[78] Bostick consented and cocaine was found.

Bostick was charged with drug trafficking and moved to suppress the contraband on the ground that it had been seized in violation of his Fourth Amendment rights, in that, the officers seized him without any reasonable suspicion.[79] The trial court denied the motion, and Bostick pleaded guilty while reserving the right to appeal the denial of the suppression motion. Bostick appealed and the Florida Supreme Court reversed, holding that Bostick was "seized" since a reasonable passenger would not have felt free to leave the bus to avoid questioning by the officers.[80] The Florida Supreme Court categorically ruled that, "[a]n impermissible seizure result[s] when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage."[81] The United States Supreme Court granted certiorari[82] to determine whether Florida's decision, that such conduct is *per se* unconstitutional, is consistent with the Fourth Amendment's standards on investigatory stops.

The Court, in a 6-3 decision authored by Justice O'Connor, analyzed the issue in light of similar investigatory stops conducted by law enforcement officials that do not amount to a seizure. The Court stated that:

> [O]ur cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business . . . the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger

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[77] *Id.* at 432.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 433. *See* Bostick v. Florida, 554 So.2d 1153 (1989).
[81] *Bostick,* 554 So.2d at 1154.
[82] Florida v. Bostick, 498 U.S. 894 (1990).

> Fourth Amendment scrutiny unless it losses its consensual nature.[83]

Twenty-two years earlier, the *Terry*[84] case discussed the issue raised by Justice O'Connor. In *Terry,* the Court stated that "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[85]

The Court's analysis, however, differed from the typical *Terry* scenario which presents the issue of whether a reasonable person would feel "free to leave." The Court relied upon their decision in *Immigration and Naturalization Service v. Delgado,*[86] where it was acknowledged that the factory workers in question may not have been free to leave work when the INS agents arrived. The Court in *Delgado* surmised that no seizure occurred because there was no "reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer."[87] In *Bostick,* Justice O'Connor held that the "free to leave" standard was inapplicable in the bus scenario since Bostick's confinement "was the natural result of his decision to take the bus."[88] The Court held that the proper standard when examining this type of scenario is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[89]

Although the Supreme Court remanded the case to determine whether Bostick was seized under the guideline as set forth in its decision, the Court did, however, reject Bostick's argument "[t]hat he must have been seized because no reasonable person would

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[83] *Bostick*, 501 U.S. at 434.

[84] *See supra* notes 23-37 and accompanying text for a discussion of *Terry*.

[85] Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

[86] 466 U.S. 210 (1984) (wherein INS agents regularly visited factories at random and questioned employees with regards to their citizenship).

[87] *Id.* at 218.

[88] *Bostick,* 501 U.S. at 436.

[89] *Id.*

freely consent to a search of luggage that he or she knows contains drugs."[90] The Court's rationale for rejecting this argument was that the reasonable person test assumes an innocent person, not a person who has narcotics in their possession.

The decision in *Bostick* is important because the Court rejected the Florida Supreme Court's *per se* ruling that when police board a bus and ask for consent to search, an unconstitutional seizure has taken place. Additionally, the Court expanded the permissible scope of the investigatory stop test set forth in *Delgado* and went beyond the issue of whether an individual would feel free to leave, and instead asked whether that individual felt free to decline a law enforcement official's request. Federal law enforcement agents, relying on the Court's decision may now conduct numerous types of investigatory techniques designed to combat the drug trade, sale of illegal weapons, and the detection of other crimes without first obtaining a warrant or even probable cause or reasonable suspicion.

Although the Supreme Court in *Bostick* specifically stated that, "[t]here is no doubt that if this same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure,"[91] the Court of Appeals has developed a unique standard to preserve the rights of New York citizens.

In two separate cases, decided in one opinion, the New York Court of Appeals expanded its guidelines for what constitutes a seizure under the New York Constitution. In *People v. Hollman*[92] and *People v. Saunders*,[93] the Court of Appeals was confronted with fact patterns similar to the scenario that the *Bostick* Court assumed would clearly not be a seizure.[94] In *Hollman,* a narcotics officer at the Port Authority Bus Terminal in New York City observed Hollman coming down an escalator, looking around the terminal, and carrying an orange bag.[95] After arriving at the main

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[90] *Id.* at 437-38.
[91] *Id.* at 434. *See also* Florida v. Rodriguez, 495 U.S. 1 (1984).
[92] 79 N.Y.2d 181, 590 N.E.2d 204, 581 N.Y.S.2d 619 (1992).
[93] *Id.*
[94] *See supra* notes 73-90 and accompanying text.
[95] *Hollman*, 79 N.Y.2d at 185, 590 N.E.2d at 206, 581 N.Y.S. 2d at 621.

level of the terminal, Hollman looked around again, and proceeded to go back up the escalator. A few minutes later, Hollman was observed descending the escalator with another individual who was carrying a black bag. Hollman and the other individual from a distance of approximately 10 feet, spoke to each other for approximately 20 minutes while Hollman's bag was placed on the ground between them.[96] Hollman then went into the bathroom with his bag and the other individual, and then returned to their position. Approximately 15 minutes later, Hollman and the other individual boarded the bus. Both the defendant and the individual placed their bags in the rack two or three seats ahead of the ones they eventually chose. The narcotics investigator approached Hollman and the other individual; identified himself, and asked a few questions. The investigator then asked where they had placed their luggage. Hollman and the other individual replied that they did not have any.[97] Both individuals as well as the other passengers denied owning the black and orange bags. The narcotics officer then opened the bags and found an ounce of crack cocaine in the orange bag, and empty plastic vials and some white powder in the black bag.[98]

In *Saunders,* the same narcotics officer was at the same location, accompanied by two other officers.[99] As they stood by the platform where buses departed for Baltimore, Washington, and Virginia, the officers observed the individuals who were boarding. The 5:00 bus began boarding at a quarter to five. Saunders, who joined the line at approximately five minutes to five,[100] was carrying a gym bag and appeared nervous. According to the narcotics officer, Saunders was observed scanning the "interior of the boarding area and at one time gave his place in the line to another passenger."[101] As Saunders approached the boarding area, he caught the officer's eye, hesitated slightly, and then proceeded.[102] The officer

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[96] *Id.* at 185-86, 590 N.E.2d at 206, 581 N.Y.S.2d at 621.
[97] *Id.* at 186, 590 N.E.2d at 206, 581 N.Y.S.2d at 621.
[98] *Id.*
[99] *Id.* at 187, 509 N.E.2d at 207, 581 N.Y.S.2d at 622.
[100] *Id.*
[101] *Id.*
[102] *Id.*

approached Saunders, identified himself and asked if he could speak with him for a moment. Saunders stated that he was going to Baltimore to visit family.[103] During this brief conversation it was noted that Saunders repeatedly was looking around, spoke rapidly and sounded nervous.[104] The officer then asked Saunder's whether he could search his bag. Saunders consented. The officer opened the bag and found a large quantity of cocaine.[105]

In *Hollman* and *Saunders,* the defendants were charged with criminal possession of a controlled substance, among other violations, and moved to suppress the contraband on the ground that the search and seizure violated their rights.[106] In both cases, a hearing was held and the search was upheld by the trial court.[107] The Appellate Division affirmed the trial court's decision. In *Hollman*, the court found that the narcotics officers' questions of Hollman were only a request for information and were appropriate absent reasonable suspicion of criminal activity. The court concluded that Hollman had abandoned the bag and relinquished any right to privacy in its contents.[108] Similarly in *Saunders,* the divided Appellate Division held that the questioning by the law enforcement officer of Saunders was only a request for information and was appropriate absent reasonable suspicion. The Appellate Division upheld the search of the bag in *Saunders* on the theory that he had consented.[109] After this decision, the *Hollman* and *Saunders* cases were consolidated and leave to appeal to the Court of Appeals was granted.

Former Chief Judge Wachtler, writing for the court, upheld the search in *Hollman* but reversed the decision in *Saunders.* [110] The court's analysis was based upon the four-tier methodology

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[103] *Id.*

[104] *Id.* at 187-88, 509 N.E.2d at 207, 581 N.Y.S.2d at 622.

[105] *Id.* at 188, 509 N.E.2d at 207, 581 N.Y.S.2d at 622.

[106] *Id.* at 185-88, 509 N.E.2d at 206-08, 581 N.Y.S.2d at 621-23.

[107] *Id.*

[108] People v. Hollman, 168 A.D.2d 259, 261, 562 N.Y.S.2d 494, 496 (1st Dep't 1990).

[109] People v. Saunders, 173 A.S.2d 239, 242, 569 N.Y.S.2d 643, 645 (1st Dep't 1991).

[110] *See supra* note 92.

developed in *People v. DeBour.*[111] In *DeBour,* the court generated a complex framework to analyze police encounters with individuals. The first tier finds that where an officer only requests information from an individual, the officer needs only an objective, credible reason; not reasonable suspicion, probable cause, or any indication of criminal activity. The second tier, known as the "common law right of inquiry," is triggered when the officer has "a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion."[112] The third tier states that when an officer has reasonable suspicion that an individual was involved in a crime rising to the level of a misdemeanor or felony, the officer is permitted to forcibly detain that individual. The final tier states that when an officer has probable cause that an individual has committed a crime, an arrest is authorized. The court in *Hollman* and *Saunders* was of the opinion that the issue revolved around whether the particular fact scenario was encompassed by the first or second tier.

The Court of Appeals held that the first tier of *DeBour* only permits "a request for information involv[ing] basic, non-threatening questions regarding, for instance, identity, address or destination."[113] The court further stated that

> [o]nce the officer asks more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer's investigation, the officer is no longer merely *see*king information. This has been a common-law inquiry that must be supported by a founded suspicion that criminality is afoot.[114]

Using these standards, the Court of Appeals set out to apply the facts of *Hollman* and *Saunders* to the *DeBour* analysis. The court

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[111] 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976).

[112] *Id.* at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385.

[113] *Hollman,* 79 N.Y.2d at 185, 590 N.E.2d at 206, 581 N.Y.S.2d at 621.

[114] *Id.* Note, however, that this standard does not take into account whether, as in *Bostick,* the individual should be judged as a reasonable person, not involved in criminal activity, who has nothing to hide, and no reason to suspect that he is being investigated.

held that where the officer asked Hollman and the other individual questions regarding their traveling plans, those questions were only requests for information and were permissible.[115] When the officer asked them whether they had luggage, the court found, this too was only a request for information.[116] At that point, the court held, given the officers knowledge that the two individuals had brought bags on the bus, the next question of whether the orange and black bags belonged to them, was "a proper exercise of the officer's common law right to inquire."[117] Thus, the court held that despite the fact that a seizure had taken place, the seizure was proper as the officer had a founded suspicion that criminal activity was afoot. Despite the outcome in *Hollman,* the court's opinion clearly went further than the Supreme Court's analysis of what conduct amounts to a seizure. The fact scenario in *Bostick* was undoubtedly more intrusive than in *Hollman,* yet the Supreme Court held that a seizure had not taken place.

In the *Saunders* scenario, the Court of Appeals overruled the Appellate Division, and suppressed the incriminating evidence as a result of an unlawful search and seizure. The court's rationale was that although the officer acted reasonably when asking Saunders questions regarding his destination, the officer "crossed the line . . . when he asked to search the defendant's bag."[118] The court did not believe that the officer had a reasonable suspicion that criminal activity was afoot and thus did not have the right to ask for Saunders' consent to search the bag. Thus, the court held "the defendant's consent was a product of the improper police inquiry . . . ."[119] Although it could be argued that the police officers in both *Hollman* and *Saunders* did not have a reasonable suspicion, the real issue is why New York requires a heightened level of suspicion before a law enforcement officer may ask a person for consent to search.

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[115] *Id.* at 193, 590 N.E.2d at 211, 581 N.Y.S.2d at 626.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 194, 590 N.E.2d at 211, 581 N.Y.S.2d at 626.
[119] *Id.*

In both the *Hollman* and *Saunders* decisions the court refused to adopt the standard established in *Bostick.*[120] The court held that "encounters that fall short of Fourth Amendment seizures still implicate the privacy interests of all citizens and that the spirit underlying those words required the adoption of a State common-law method to protect the individual from arbitrary or intimidating police conduct."[121] The Court of Appeals' decision, however, gave no analytical reasoning for their divergence other than, "as a matter of state common law, we will continue to apply *DeBour* to assess the propriety of encounters that do not rise to the level of a seizure for purposes of the Fourth Amendment."[122]

The *DeBour* decision and its interpretation by lower New York courts has been the subject of great criticism. Even Professor LaFave, stated that the *DeBour* four tier system will "likely result in such confusion and uncertainty that neither police nor courts can ascertain with any degree of confidence precisely what it takes to meet any of these standards."[123] Indeed, as a result of *DeBour* and its progeny, the New York Court of Appeals has been the subject of great criticism in both the local and national press.[124] Undoubtedly, the Court of Appeals' decisions in *Hollman, Saunders*, and *DeBour* have had a profound impact on the daily routines performed by law enforcement officers. Lower courts, relying on these decisions have suppressed incriminating evidence in many situations where

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[120] *See supra* notes 74-119 and accompanying text. The standard in *Bostick* provides whether the individual felt free to leave and whether that individual felt free to decline a law enforcement officer's request. *Bostick*, 501 U.S. at 433.

[121] *Hollman,* 79 N.Y.2d at 195, 590 N.E.2d at 212, 581 N.Y.S.2d at 627.

[122] *Id.* at 196, 590 N.E.2d at 212, 581 N.Y.S.2d at 627.

[123] 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT, § 9.3(e), at 135 (4th ed. 1996). Professor LaFave is a proponent of civil liberties and a critic of the Supreme Court's recent pro law enforcement ruling involving the Fourth Amendment.

[124] *See* Mark Kagan, *Federal and New York Approaches to Police Encounters*, N.Y. L.J, Dec. 13, 1996, at 1; Steven W. Fisher, *Rethinking Standards for Police Conduct*, N.Y. L.J., Oct. 25, 1995, at 1; Mitchell Krapes and Jay Lippman, Applying Common Sense to Search and Seizure, N.Y. L.J., Nov. 13, 1996, at 1; Max Boot, *The Exoneration Rule*, WALL ST. J., Feb. 4, 1997, at A18.

the federal government, based upon its precedent, would have denied the defendant's motion to suppress. In addition, many cases are pleaded to lesser crimes and sentences in order to avoid the suppression of incriminating evidence at pre-trial hearings. Appellate and trial judges examining appeals and suppression motions have the luxury of contemplating and analyzing each prong of *DeBour*, its subtleties and the plethora of recent case law. However, police officers in the field are left with little guidance on how to operate in their encounters with suspected criminals.

People v. Turriago[125] provides an illustration of the problems associated with this area of search and seizure law. In *Turriago*, the Appellate Division reversed a murder conviction based upon an "unlawful" search of Turriago's trunk. Turriago had been stopped by police for speeding in an area in which police were looking for individuals who were illegally hunting for deer. The arresting officer asked Turriago about boxes in the back of his van and then asked for his consent to look in the trunk. The defendant consented and inside the trunk was the body of a murder victim. On appeal, the murder conviction was reversed on the premise that the request for consent was invalid as the police officer had no independent suspicion that criminal activity was afoot. Relying on *Hollman*, the Appellate Division stated that a request for consent was an illustration of a common law right to inquire. Thus, the officer, according to the court, only had the right to request information. Since the officer had no suspicion that Turriago had actually violated the hunting regulations, the request for consent to search his trunk was invalid.[126]

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[125] 219 A.D.2d 383, 644 N.Y.S.2d 178 (1st Dep't 1996), *aff'd* 90 N.Y.2d 77, 681 N.E.2d 350, 659 N.Y.S.2d 183 (1997).

[126] 90 N.Y.2d 77, 681 N.E.2d 350, 659 N.Y.S.2d 183 (1997). The Court of Appeals refused to review the lower court's analysis involving the *DeBour* and *Hollman* cases. Although the District Attorney's Office argued that the Appellate Division's opinion should have been reversed as the "[r]equirement of a founded suspicion of criminal activity does not apply when the police *seek* consent to search a vehicle following a stop for a traffic violation . . . ." *Id.* at 80, 681 N.E.2d at 351, 659 N.Y.S.2d at 184. The Court of Appeals declined to address that issue as they believed it was not preserved. *Id.* The court did, however, remit the case to the trial court after analyzing the

The Supreme Court, in a case similar to *Turriago*, specifically ruled that consent to search a car is valid even where the suspect is free to leave. In *Ohio v. Robinette*,[127] the Court, held, 8-1, that that when a police officer asks for consent to search, the only issue is the voluntariness of the consent. The defendant's knowledge, or lack thereof that he may refuse to consent, is only one of the factors to be considered. The Supreme Court's decision in *Robinette* clearly did not mandate that reasonable suspicion be found in order for a police officer request for consent to search.[128]

Another example of the United States Supreme Court's pragmatic view involving the interpretation of what constitutes a seizure under *Terry* occurred when the Court decided the case of *California v. Hodari D.*[129] In *Hodari D.*, two police officers were on routine patrol in a high crime area in Oakland, California.[130] Both officers were in civilian clothing traveling in an unmarked car, but had jackets bearing the word "Police" on the front and back. As the officers came around a corner, they noticed four or five youths surrounding a car which was parked at the curb.[131] When the youths saw the officers, they took flight.[132] This conduct aroused the suspicion of the officers. One officer remained in the car, while the other gave chase by foot. As Hodari emerged from an alley, the officer chasing on foot was almost upon him when Hodari threw a small object that appeared to be a rock.[133] The officer tackled Hodari and hand-cuffed him. A search of Hodari found

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inevitable discovery doctrine and concluding that the lower court erred by not applying that doctrine to the factual scenario as urged by the prosecutor. *Id.* at 85, 681 N.E.2d at 354, 659 N.Y.S.2d at 187.

[127] 117 S. Ct. 417 (1996).

[128] *See, e.g.*, People v. Alexander, 189 A.D.2d 189, 595 N.Y.S.2d 279 (4th Dep't 1993); People v. Boyd, 188 A.D.2d 239, 594 N.Y.S.2d 147 (1st Dep't 1993); People v. Bordeaux, 182 A.D.2d 1095, 583 N.Y.S.2d 865 (4th Dep't 1992); People v. Bailey, 204 A.D.2d 751, 204 A.D.2d 751, 611 N.Y.S.2d 372 (3d Dep't 1994); People v. Parker, N.Y. L.J., Apr. 17, 1995, at 33 (Dist. Ct. Nassau Co. Apr. 17, 1995).

[129] 499 U.S. 621 (1991).

[130] *Id.* at 622.

[131] *Id.*

[132] *Id.* at 622-23.

[133] *Id.* at 623.

$130 and a pager. The rock which Hodari threw to the ground was later tested and determined to be crack cocaine.

Hodari was prosecuted in juvenile court, where a motion to suppress was denied. "The California Court of Appeals, however, reversed, holding that Hodari had been seized when he saw the officer running towards him, that this seizure was unreasonable under the Fourth Amendment, and that the evidence of cocaine had to be suppressed as the fruit of that illegal seizure."[134] The Supreme Court granted certiorari[135] to decide whether the officer had seized Hodari within the meaning of the Fourth Amendment.

Hodari's claim that he was seized was based upon the proposition that a seizure occurs, "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."[136] In other words, Hodari's claim was that when the officer gave chase, there was a "show of authority" that amounted to a seizure in terms of the Fourth Amendment. The Court's opinion, written by Justice Scalia, held that Hodari had not been seized under the Fourth Amendment when the officer gave chase. The Court's rationale was that in order to be seized by a "show of authority" an individual must objectively feel that he is not free to leave.[137] The Court stressed that although Hodari may not have felt free to go about his business, the issue is "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person."[138] Thus, the Court concluded that Hodari was not seized until he was tackled, and that the crack cocaine which he threw to the ground was not the result of an unconstitutional seizure.

In New York, Hodari's crack cocaine would likely be suppressed as the fruit of an illegal police seizure. In *People v. Holmes,*[139] two

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[134] *Id.*

[135] 498 U.S. 807 (1990).

[136] Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

[137] *See* United States v. Mendenhall, 446 U.S. 544 (1980); Michigan v. Chesternut, 486 U.S. 567 (1988); Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210 (1984).

[138] *Hodari D.*, 499 U.S. at 628.

[139] 81 N.Y.2d 1056, 916 N.E.2d 396, 601 N.Y.S.2d 459 (1993).

police officers were in a marked car on Amsterdam Avenue between 163rd and 164th Street in Manhattan and noticed a group of men standing on the corner which was a known narcotics location. One of the officers noticed a large bulge in Holmes's jacket pocket and also saw Holmes leave the group. As the officer called for Holmes to come over, Holmes ran away, and the officer gave chase. While running down 163rd Street, the defendant threw a plastic bag through a chain link fence. Holmes was eventually caught, and the bag was recovered which was later determined to contain crack cocaine. At trial, Holmes' motion to suppress was denied. The Appellate Division, however, unanimously reversed and suppressed the incriminating evidence as the result of an improper seizure.[140]

The Court of Appeals, using the *DeBour* guidelines,[141] upheld the Appellate Division's decision to suppress the evidence. The Court of Appeals held that "[w]hile the police may have had an objective credible reason to approach defendant to request information . . . those circumstances, taken together with defendant's flight, could not justify the significantly greater intrusion of police pursuit."[142] The Court of Appeals decision in *Holmes* effectively indicates to the police that while they may have a right to inquire of an individual where they have an objective, credible reason, but if that individual takes flight, the police cannot follow. The Court of Appeals attempted to justify their decision in one paragraph, by stating "[i]f these circumstances could combine with flight to justify pursuit, then in essence the right to inquire would be tantamount to the right to seize, and there would, in fact, be no right 'to be let alone.' That is not, nor should it be, the law."[143] Judge Bellacosa, in his dissenting opinion, rationally argued that, "something as elemental as running away from a police officer, after a concededly lawful approach and inquiry, should not be rendered *per se* legally meaningless, because the law then is propelled beyond reasonable comprehension or

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[140] People v. Holmes, 181 A.D.2d 27, 585 N.Y.S.2d 718 (1st Dep't 1992).

[141] *See supra* notes 111-114 and accompanying text.

[142] *Holmes,* 81 N.Y.2d at 1058, 619 N.E.2d at 398, 601 N.Y.S.2d at 461.

[143] *Id.*

acceptance."[144] Under the guise of protecting the rights of every New Yorker, the New York Court of Appeals has created a right to runaway from the police without repercussion. It is difficult to imagine any law abiding citizen that will utilize this new-founded right. On the other hand, savvy criminals will routinely exercise this right to flight. In known drug locations, individuals routinely run and throw their bags of contraband to the ground.[145]

Once an individual is stopped and is suspected of committing a crime, it is a customary practice for a police officer to pat-down the individual in order to ascertain whether the suspect is armed and dangerous. In *Terry v. Ohio*,[146] the Court approved a pat-down of a suspect by a police officer when the officer has articulable suspicion that the suspect is armed and poses a threat. As the purpose of the pat-down is to defuse any potentially dangerous situation, it was limited to areas where weapons may be discovered. *Terry* added that where the protective search goes beyond what is necessary to determine if the suspect is armed, the search is no longer valid and any evidence found will be suppressed.[147] The limitations of the *Terry* pat-down, however, were re-visited in *Minnesota v. Dickerson*.[148]

In *Dickerson*, the Court confronted the issue of whether police officers may seize non-threatening "contraband detected through the sense of touch during a pat-down search."[149] In *Dickerson,* two officers on routine patrol observed Dickerson leaving an apartment that was a known crack house. Dickerson began walking toward the police car, but upon making eye contact with the police and spotting the car, Dickerson abruptly halted and began walking in

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[144] *Id.* at 1059, 619 N.E.2d at 399, 601 N.Y.S.2d at 462 (Bellacosa, J., dissenting).

[145] Indeed, the author of this article has been in court when a judge advised a defendant that when he was released he should run when he sees a patrol car in the neighborhood.

[146] 392 U.S. 1 (1968). *See supra* notes 29-43 and accompanying text.

[147] Terry v. Ohio, 392 U.S. 1, 29-31 (1968). *See also* Sibron v. New York, 392 U.S. 40, 65-66 (1968).

[148] 508 U.S. 366 (1993).

[149] *Id.* at 371.

the opposite direction.[150] Based upon these observations, the police ordered Dickerson to submit to a pat-down, which revealed no weapons. However, the officer who conducted the pat-down, felt a small lump in Dickerson's jacket, which he "examined . . . with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane."[151] The officer then reached into Dickerson's pocket and found a bag later determined to contain crack cocaine. The trial court, the Minnesota Court of Appeals, and the Minnesota Supreme Court held that the stop and frisk of Dickerson was permissible under *Terry*, but the Minnesota Supreme Court further held that the seizure of the cocaine was unconstitutional. The rationale was based upon its refusal to extend the plain view doctrine to the sense of touch. In other words, although the officer had a right to touch the cellophane bag, the plain view doctrine would not permit its seizure on the grounds that "the sense of touch is inherently less . . . reliable than the sense of sight."[152] Thus, the Minnesota Supreme Court categorically held that when a pat-down for weapons of an individual occurs, the seizure of contraband is unconstitutional regardless of whether the officer knows that what he is touching is contraband.

Justice White, writing for a unanimous Court, reversed the Minnesota Supreme Court ruling and held that an officer may seize non-threatening contraband detected during a pat-down search for weapons of a person whom the officer has briefly detained based upon the officer's reasonable conclusion that criminal activity may be afoot. Justice White wrote that:

> [i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already

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[150] *Id.* at 368-69. Dickerson evidently had been reading current case law in New York regarding the right to flight. Unfortunately for him, Minnesota does not follow New York's interpretation of the Fourth Amendment. In New York, the stop itself would have been invalid. *See supra* notes 134-138 and accompanying text.

[151] *Id.* at 369.

[152] Minnesota v. Dickerson, 481 N.W.2d 840, 845 (1992).

> authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.[153]

Thus, the Court extended the purview of the *Terry* pat-down where the contents are immediately apparent.[154]

The New York Court of Appeals, in two separate decisions,[155] has refused to adopt the "plain touch" exception to the warrant requirement of the Fourth Amendment. Thus, in New York, where police conduct a lawful pat-down search for weapons pursuant to *Terry,* and it becomes immediately apparent to the officer conducting the pat-down that the individual possesses other contraband, the officer can not seize such items under the "plain touch" exception. In *People v. Diaz,*[156] two officers, while on patrol in the lower east side of Manhattan, observed a group of people congregating and passing objects from hand to hand.[157] Over the course of twenty- minutes of observation, the officers noticed Diaz in the center of the group. Additionally, Diaz was observed standing alongside of a parked car. When the officers approached in their marked police car, Diaz began to walk away, however, the officers called him over.[158] As Diaz approached the police car, the officers asked him to stop reaching into his front pocket. Diaz ignored the officers wishes, and continued to place his hand in his pocket. When Diaz stood next to the police car, a bulge was noticed in his pocket. To insure his safety, one of the officer's grabbed Diaz's front pocket. It then became immediately

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[153] *Dickerson,* 508 U.S. at 375-76 (citation omitted).

[154] In the case at hand, the Court ruled, 6-3, that the pat-down exceeded the permissible scope as the officer determined that the lump was contraband only *after* squeezing, sliding, and manipulating the contents of the pocket, which the officer already knew contained no weapon.

[155] People v. Diaz, 81 N.Y.2d 106, 612 N.E.2d 298, 595 N.Y.S.2d 940 (1993); *In re* Marrhonda G., 81 N.Y.2d 942, 613 N.E.2d 568, 662 N.Y.S.2d 597 (1993).

[156] 81 N.Y.2d 106, 612 N.E.2d 298, 595 N.Y.S.2d 940 (1993).

[157] *Id.* at 108, 612 N.E.2d at 299, 595 N.Y.S.2d at 941.

[158] *Id.*

apparent that he possessed vials.[159] Diaz attempted to flee, but one of the officers was able to pull him partially through the car window. While doing so, he removed 18 vials of crack cocaine from his pocket.[160]

Prior to Diaz's trial, he filed a motion to suppress the contraband based upon an illegal search and seizure. The trial court granted Diaz's motion on the basis that the initial stop and pat-down violated his rights, in that, the police had no reasonable suspicion to stop him in the first place. The Appellate Division reversed[161] holding that there was reasonable suspicion for the stop and that the subsequent search and seizure was permissible based upon what the officer felt during the legal pat-down of Diaz. The Court of Appeals declined to review the Appellate Division's decision that the officers had reasonable suspicion to stop and conduct a pat-down of Diaz.[162] The Court of Appeals stated that "[t]he only legal issue before us is whether . . . the information allegedly obtained by Officer Healey through his sense of touch in conducting the pat-down justified the subsequent search of defendant's pocket."[163] In holding that the officer was not justified in his search, the Court of Appeals held that where "Officer Healey knew that defendant's pocket did not contain a weapon, he was not authorized to search the pocket or seize its contents . . . ."[164] Although the People argued that Officer Healey's actions were justified under an extension of the plain view exception to the warrant requirement,[165] the Court of Appeals disagreed and held that "the plain view exception cannot logically be extended to concealed items which are

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[159] *Id.*

[160] *Id.* at 108, 612 N.E.2d at 300, 595 N.Y.S.2d at 942.

[161] People v. Diaz, 181 A.D.2d 597, 581 N.Y.S.2d 774 (1992).

[162] People v. Diaz, 81 N.Y.2d 106, 108, 612 N.E.2d 298, 300, 595 N.Y.S.2d 940, 942 (1993)

[163] *Id.* at 108-09, 612 N.E.2d at 300, 595 N.Y.S.2d at 942.

[164] *Id* at 109, 612 N.E.2d at 300, 595 N.Y.S.2d at 942.

[165] *Id.* at 110, 612 N.E.2d at 301, 595 N.Y.S.2d at 943. The People argued that a plain-touch exception should be adopted in New York as it is directly analogous to the plain view exception.

discoverable only through touch."[166] Thus, in New York, where the police with reasonable suspicion, pat-down a suspect for weapons and it becomes immediately apparent that the suspect possesses contraband, the police cannot seize such evidence. Therefore, if the police have probable cause to make a lawful arrest, they may search the suspect incident to the arrest.[167] However, where the police act on a reasonable suspicion and pat-down the suspect for weapons and therein find contraband, an arrest cannot be justified upon that search as the contraband cannot be used in the probable cause determination.

II. WHAT CONSTITUTES PROBABLE CAUSE?

The New York Court of Appeals has also deviated from the established principles laid out by the United States Supreme Court to determine when a search warrant, based upon information obtained from an informant, constitutes probable cause. Basing the deviation on independent state grounds, the Court of Appeals in *People v. Johnson*,[168] *People v. Griminger*,[169] and *People v. DiFalco*,[170] refused to follow the totality of the circumstances test established by the United States Supreme Court in *Illinois v. Gates*.[171]

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[166] *Id.* at 111, 612 N.E.2d at 301, 595 N.Y.S.2d at 943. Similarly, in the case of *In re* Marrhonda G., 81 N.Y.2d 942, 613 N.E.2d 568, 597 N.Y.S.2d 662 (1993), the Court of Appeals suppressed incriminating evidence and held that, "[w]e disagree with the conclusion of the courts below, however, that the warrantless search of respondent's bag was justified under a so-called 'plain-touch' exception to the warrant requirement. We have rejected that exception this session in People v. Diaz 81 N.Y.2d 106, 612 N.E.2d 298, 595 N.Y.S.2d 940 decided today." *Marrahonda G*, 81 N.Y.2d at 945, 613 N.E.2d at 569, 597 N.Y.S.2d at 663. *See also* Peopie v. Rosado, 214 A.D.2d 375, 625 N.Y.S.2d 162 (1st Dep't 1995); People v. Peterson, N.Y. L.J. April 10, 1995, p.29; People v. Calizaire, 208 A.D.2d 378, 617 N.Y.S.2d 10 (1st Dep't 1994).

[167] *See* Sibron v. New York, 392 U.S. 40 (1967).

[168] 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985).

[169] 71 N.Y.2d 635, 524 N.W.2d 409, 529 N.Y.S.2d 55 (1988).

[170] 80 N.Y.2d 693, 610 N.E.2d 352, 594 N.Y.S.2d 679 (1993).

[171] 462 U.S. 213 (1983).

Prior to *Gates*, federal courts used a two prong test to evaluate whether a search warrant, based upon information supplied by an informant, had sufficient probable cause to comply with the Fourth Amendment. This examination was based upon the Court's decisions in *Aguilar v. Texas*[172] and *Spinelli v. United States*.[173] The *Aguilar-Spinelli* test required a magistrate to analyze probable cause based upon the informant's basis of knowledge as well as his veracity or reliability. In *Gates,* however, the Court found that this rigid two-prong approach was unnecessary to comply with the Fourth Amendment's requirement that a search and seizure be based upon probable cause. The Court in *Gates* held that the proper standard for determining probable cause for issuance of a search warrant based on hearsay from an informant was the totality of the circumstances. Although the Court adopted this approach in 1983, the New York Court of Appeals still requires examination of both prongs of *Aguilar-Spinelli* when making a determination as to whether probable cause exists for a search warrant. In some instances, the New York Court of Appeals has gone even further, requiring the magistrate or trial judge to inquire as to exactly how the informant acquired his knowledge that is the basis for the search warrant.

In *Gates*,[174] the Supreme Court upheld a search conducted by police officers of an automobile and a home after receiving an anonymous letter that stated that Mr. and Mrs. Gates made their living selling drugs. In addition, the letter stated that the Gates' purchased their drugs in Florida and gave the date of the next transaction to occur. Moreover, the letter explained in detail how the Gates' purchased and transported narcotics.[175] After receiving

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[172] 378 U.S. 108 (1964).

[173] 393 U.S. 410 (1969).

[174] 462 U.S. 213, 225 (1983).

[175] Specifically, the letter stated that:

> [t]his letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with the drugs, then

this anonymous letter, law enforcement officials confirmed the Gates' address as well as an airplane reservation to Florida in the name of "L. Gates."[176] Furthermore, agents watched Gates board the plane to Florida and upon arrival, take a taxi to a nearby Holiday Inn. Gates went to a room registered under the name of Susan Gates. The next morning agents saw an unidentified woman and Gates leave the motel in a car that was registered by Gates. Based on the anonymous letter and the agents' observations, a search warrant was issued for the Gates' residence and the automobile. The police searched the trunk of the car and found approximately 350 pounds of marijuana. A search of the Gates' home, revealed the presence of marijuana, weapons, and other contraband.

The Gates moved to suppress the incriminating evidence and claimed it was obtained in violation of their Fourth and Fourteenth Amendment rights. Specifically, they claimed that the search warrant lacked the requisite probable cause required to comply with the Fourth Amendment. The Illinois Circuit court agreed, and suppressed all of the inculpatory evidence. The court reasoned that the affidavit for the warrant lacked probable cause to "believe that the Gates' automobile and home contained the contraband in question."[177] The decision was affirmed by the Illinois Appellate court,[178] as well as the Supreme Court of Illinois.[179] The Supreme

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> Lance flys down and drives it back. Sue flys back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement. They brag about the fact they never have to work, and make their entire living on pushers. I guarantee if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.

Id. at 225.

[176] *Id.* at 226.

[177] *Id.* at 227.

[178] Illinois v. Gates, 403 N.E.2d 77 (1980).

[179] Illinois v. Gates, 423 N.E.2d 887 (1981).

Court of Illinois found that the anonymous letter, alone, could not be enough to sustain the issuance of a search warrant. However, the court stated that corroboration by law enforcement officials could be sufficient to permit the issuance of a search warrant based upon probable cause. In this particular instance, however, the court relied on the two-prong test of *Aguilar-Spinelli* and held that there was not sufficient corroboration. The Supreme Court of Illinois believed that the anonymous letter had to satisfy both prongs of the *Aguilar-Spinelli* test, in that the letter had to reveal the writers "basis of knowledge" as well as his "veracity" or "reliability." The Supreme Court of Illinois believed that the "veracity" prong was not fulfilled as "[t]here was simply no basis [for] conclud[ing] that the anonymous person was credible."[180]

The United States Supreme Court granted certiorari[181] and overruled the Supreme Court of Illinois.[182] The Court held that rather than applying the *Aguilar-Spinelli* two-prong test when making a determination of whether a search warrant has the requisite probable cause, the "totality of the circumstances" must be evaluated. The Court found that:

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.[183]

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[180] *Gates*, 423 N.E.2d at 891.

[181] 454 U.S. 1140 (1982).

[182] It is interesting to note that originally this decision was intended to adopt the good-faith exception to the Fourth Amendment. After hearing oral argument and receiving appellate briefs, the Justices asked that the litigants address the question of the good faith exception. *See* Illinois v. Gates, 459 U.S. 1028 (1982). In addition, Justice Rehnquist, who delivered the opinion of the Court, apologized for not having addressed that issue in the Court's opinion. *See* Illinois v. Gates, 462 U.S. 213, 216 (1983).

[183] *Gates*, 462 U.S. at 238.

The Court reasoned that the "totality of the circumstances" was an appropriate standard because the "veracity," "reliability," and "basis of knowledge" of the informant are all evaluated. The Court found that the two-prong *Aguilar-Spinelli* test greatly diminished the value of police work based upon information provided by informants. Thus the Court adopted a framework enabling magistrates to analyze warrant applications under the totality of the circumstances rather than follow the rigid requirements of the two-prong test.

Four decisions by the New York Court of Appeals demonstrate its divergence from the standards established in *Gates*. Rather than adopt an approach that enables a judge to analyze all of the factors surrounding a warrant application based upon information from an informant, New York requires that both prongs of the *Aguilar-Spinelli* test be met. Thus, if an informant is known by law enforcement officials as providing extremely reliable tips regarding criminal activity or is a very trustworthy citizen, a warrant application's failure to set forth the basis of his knowledge would be an absolute bar to issuing the warrant. Conversely, if an informant gives a detailed description of ongoing criminal activity and how he obtained that information, a warrant cannot be issued if there is no information in the warrant application regarding the informant's veracity or reliability.

The New York Court of Appeals has refused to adopt the "totality of the circumstances" analysis in determining whether a search or arrest warrant has sufficient probable cause. Relying on independent state grounds, the Court of Appeals has refused to follow the Supreme Court's precedent in *Gates*. For example, in *People v. Griminger*,[184] the Court of Appeals suppressed 10 ounces of marijuana and over $6,000 in cash and drug-related paraphernalia and held that the search of Griminger's home was based upon a search warrant that lacked the requisite probable cause. The search warrant affidavit was based on an informant who had been arrested by the United States Secret Service for counterfeiting. The informant told the Secret Service that he knew that Griminger kept a large quantity of cocaine in his bedroom and

[184] 71 N.Y.2d 635, 524 N.E.2d 409, 529 N.Y.S.2d 55 (1988).

attic. An affidavit to search Griminger's home was prepared and stated that the informant, on numerous occasions, had observed marijuana and cocaine in the bedroom and attic. In addition, the affidavit stated that the informant had recently seen 150 to 200 pounds of marijuana at Griminger's home. Based upon this information, a Magistrate issued the search warrant and the inculpatory evidence was obtained. The Court of Appeals suppressed the evidence and held that

> [w]e are not persuaded . . . that the *Gates* approach provides a sufficient measure of protection, and we now hold that, as a matter of state constitutional law, the *Aguilar-Spinelli* two-prong test should be applied in determining whether there is a sufficient factual predicate upon which to issue a search warrant.[185]

The court went on to state that the two-prong test is necessary to insure, "the rights of privacy and liberty upon the word of an unreliable hearsay informant, a danger we perceive under the *Gates* totality-of-the-circumstances test."[186] Applying the two-prong test to the affidavit, the Court of Appeals held that the reliability prong was not satisfied, and thus the warrant invalid and the evidence suppressed.[187]

A police officer may arrest a person without a warrant when the officer has probable cause to believe that such person has committed a crime. Probable cause may be supplied, in whole or in part, through hearsay information. Therefore, it is important to analyze how the courts interpret the determination of probable cause in non-warrant cases when the police make an arrest based upon information supplied by an informant or other hearsay means.

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[185] *Griminger*, 71 N.Y.2d at 639, 524 N.E.2d at 411, 529 N.Y.S.2d at 57.

[186] *Id.* at 641, 524 N.E.2d at 412, 529 N.Y.S.2d at 58.

[187] It is also important to note that had the New York Court's adopted the good faith exception to the Fourth Amendment's exclusionary rule, the evidence could be admitted despite the lack of probable cause. *See infra* notes 344-379 and accompanying text.

In *People v. Elwell,*[188] for example, the New York Court of Appeals upheld the suppression of an indictment for criminal possession of a weapon in the third degree. The police received a call from an informant with whom they had previously worked and who had provided them with reliable information. The informant advised the police that Elwell was in possession of a .25 caliber automatic pistol and was operating a red Le Mans with New York registration 915 DWY with a CB antenna on the back. In addition, the informant provided the police with the location of the automobile and said that it would be leaving soon. The informant did not give the police any indication how he knew of this information. The police went to the location provided by the informant and found the car. Shortly thereafter, Elwell and another person went into the car and were eventually stopped by the police. A search of the passenger compartment of the car revealed a .25 caliber Colt automatic under the seat of the car. The Court of Appeals held that the evidence must be suppressed as the informant never revealed his basis for his knowledge. The Court found that:

> [I]t is not enough that a number, even a large number, of details of noncriminal activity supplied by the informant be confirmed. Probable cause for such an arrest or search will have been demonstrated only when there has been confirmation of sufficient details suggestive of or directly related to the criminal activity informed about to make reasonable the conclusion that the informer has not simply passed along rumor, or is not involved . . . in an effort to 'frame' the person informed against.[189]

Therefore, the court held that a "warrantless search or arrest will be sustained only when police observe conduct that is suggestive of, or directly related"[190] to the criminal activity or where the information furnished to the police is "so detailed as to make clear it must have been based on personal observation of that activity."[191]

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[188] 50 N.Y.2d 231, 406 N.E.2d 471, 428 N.Y.S.2d 655 (1980).
[189] *Id.* at 234-35, 406 N.E.2d at 473, 428 N.Y.S.2d at 657.
[190] *Id.* at 241, 406 N.E. 2d at 477, 428 N.Y.S.2d at 662.
[191] *Id.*

In the instant case, however, the court found that the police had not observed any conduct which indicated that criminal activity was being conducted.

The Court of Appeals' decision in *Elwell* went further than the Supreme Court's decision in *Aguilar v. Texas*.[192] The Court of Appeals held that a determination of probable cause in a warrantless search or arrest can only be satisfied where the police make first-hand observations consistent with criminal activity. Thus, the basis of knowledge prong of the *Aguilar-Spinelli* test, in non-warrant cases, cannot be met by the totality of the circumstances, or even by an informant providing reliable information which includes his basis of knowledge. New York requires that the information be reliable, that its basis be known, and that the police witness criminal activity.

People v. Johnson,[193] also illustrates the problems associated with applying the two-prong basis of knowledge-veracity test when police make an arrest without a warrant. In *Johnson,* the Court of Appeals applied the *Aguilar-Spinelli* test and suppressed two inculpatory statements that the court found were the result of an arrest that lacked probable cause. Although Johnson was convicted of murdering a grocery store owner during a robbery, the Court of Appeals reversed the conviction finding it was based on an unlawful arrest. Shortly after the felony-murder, law enforcement officials questioned Bolivar Abreu who initially denied any knowledge of the incident. Eventually, however, Abreu provided the officers with information that implicated Johnson. Abreu stated that he had witnessed a conversation between Johnson and another person in which they discussed the crime.[194] Moreover, Abreu admitted that he had traded a .38 caliber revolver for a rifle prior to the robbery. Johnson was thereafter arrested based upon this information. He was read his *Miranda* rights and eventually confessed to murdering the shop owner. He later repeated the confession in a videotape. The Court of Appeals conducted an analysis of the *Aguilar-Spinelli* rules, and concluded that Abreu's information lacked the requisite

[192] 378 U.S. 108 (1964).
[193] 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985).
[194] *Id.* at 402, 488 N.E.2d at 442, 497 N.Y.S.2d at 621 n.1.

reliability to warrant a determination of probable cause by the arresting police officers.[195] Despite the fact that Abreu's statement was against his penal interest, the court concluded that it lacked the requisite reliability. Moreover, the Court of Appeals declined to apply the totality of the circumstances test enunciated in *Gates* to this situation and stated:

> This appeal presents one of those situations in which we believe that the aims of predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens are best promoted by applying State constitutional standards. In doing so we also provide 'bright line' guidance to police personnel in performing their duties.[196]

The analysis by the court was clearly an effort to prevent the United States Supreme Court from reversing their decision. By basing the decision in *Johnson* on independent state grounds, the New York Court of Appeals prevented review of their finding that the "totality of the circumstances" test in *Gates* should not apply to non-warrant cases.[197]

In recent years the New York Court of Appeals has consistently refused to adopt the totality of the circumstances test when examining whether probable cause exists in a search warrant or when making an arrest. As a result, incriminating evidence and confessions are suppressed. Furthermore, many requests by police for search warrants are rejected by prosecutors who believe that the evidence obtained will ultimately be suppressed based upon the hypertechnical analysis of the Court of Appeals.

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[195] *Johnson*, 66 N.Y.2d at 401-03, 488 N.E.2d at 441-43, 497 N.Y.S.2d at 620-22 (citations omitted).

[196] *Id.* at 407, 488 N.E.2d at 445, 497 N.Y.S.2d at 624.

[197] *See also* People v. Landy, 59 N.Y.2d 369, 375, 452 N.E.2d 1185, 1188, 465 N.Y.S.2d 857, 860 (1983) (holding that the two pronged *Aguilar-Spinelli* rule must be established for there to be probable cause when making a warrantless arrest); People v. DiFalco, 80 N.Y.2d 693, 696, 610 N.E.2d 352, 353, 594 N.Y.S.2d 679, 680 (1993) (holding that probable cause for a warrantless arrest may be based on hearsay, but only upon a showing that both the basis of knowledge and veracity components of *Aguilar-Spinelli* are met).

Many of these requests are reasonable, and would surely be upheld under federal guidelines. However, in New York, a prosecutor most review a search warrant under both prongs of the *Aguilar-Spinelli* test.

III. PROBABLE CAUSE AND THE FIRST AMENDMENT

The issue of whether a search warrant has probable cause becomes more complicated when the items sought by the police are presumptively protected by the United States Constitution's First Amendment. In New York, a higher standard of probable cause is necessary when the police endeavor to search areas presumptively protected by the First Amendment. The issue of whether a higher standard of probable cause is necessary for the issuance of a search warrant for items protected by the First Amendment was analyzed by the Supreme Court in *New York v. P.J. Video*.[198] In *P.J. Video*, two individuals were charged with six counts of obscenity after a search warrant was obtained and executed recovering numerous videotapes in violation of the New York Penal Law. The application for the search warrant was based upon an investigation conducted by the Erie County District Attorney's Office. An investigator rented ten videocassettes, viewed them in their entirety, and executed an affidavit summarizing the theme and conduct depicted in each film.[199] Thereafter, a justice of the New York Supreme Court issued the warrant, authorizing the search of the store and the seizure of the movies. Thirteen movies were seized in all, and the store owner moved for suppression based upon his belief that the search warrant lacked probable cause because the issuing justice had not personally viewed the movies. The Supreme Court granted the motion and dismissed the charges. The New York Court of Appeals affirmed the decision,[200] on different grounds. The Court of Appeals held that there is a higher standard for evaluating a warrant application seeking to seize things that are

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[198] 475 U.S. 868 (1986).

[199] *Id.* at 870.

[200] People v. P.J. Video, Inc., 65 N.Y.2d 566, 483 N.E.2d 1120, 493 N.Y.S.2d 988 (1985), *rev'd*, 475 U.S. 868 (1986).

arguably covered by the First Amendment. Specifically, the Court of Appeals held that, "[t]here is a higher standard for evaluation of a warrant application seeking to seize such things as books and films, as distinguished from one seeking to seize weapons or drugs."[201] Applying this "higher standard" to the search warrant at hand, the Court of Appeals held that the affidavits by the District Attorney's Office were insufficient because they failed to adequately describe the movies in question and "[t]he descriptions of the action [were] not supplemented by references to the narrative or dialogue of the films . . . [and made] no attempt to reveal the story line (or lack of one) of the films . . . ."[202] In conclusion, the Court of Appeals held that the affidavits did not contain sufficient information to permit the sitting justice to apply the higher standard of probable cause and determine whether such films were obscene.[203]

The Supreme Court granted certiorari,[204] and reversed the Court of Appeals, holding that "[a]n application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally."[205] The Supreme Court then remanded back to the Court of Appeals "for further proceedings not inconsistent with this opinion."[206]

Any thought that the Court of Appeals would evaluate the search warrant based upon the Supreme Court's decision was quickly dispelled in *People v. P.J. Video, Inc.*,[207] when the Court of Appeals, per Judge Simons, held that the Supreme Court remanded the case to the Court of Appeals, "so that we could decide whether Article I, § 12 of the State Constitution imposes a more exacting standard for the issuance of search warrants authorizing the seizure

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[201] *Id.* at 569, 483 N.E.2d at 1123, 493 N.Y.S.2d at 991.

[202] *Id.* at 571, 483 N.E.2d at 1124, 493 N.Y.S.2d at 992. The five movies that formed the basis of the obscenity charges were, "California Valley Girls," "Taboo II," "Taboo," "All American Girls," and "Debbie Does Dallas." *Id.*

[203] *Id.* at 572, 483 N.E.2d at 1125, 493 N.Y.S.2d at 993.

[204] 474 U.S. 918 (1985).

[205] New York v. P.J. Video, 475 U.S. 868, 875 (1986).

[206] *Id.* at 878.

[207] 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986).

of allegedly obscene material than does the Federal Constitution."[208] The Court of Appeals held that the New York State Constitution requires a higher standard of probable cause than does the Fourth Amendment to the United States Constitution when examining whether probable cause exists to search an item presumptively protected by the First Amendment. Judge Simons, attempting to justify the court's opinion, stated that, "[b]ecause the materials presumptively enjoyed First Amendment protection--the magistrate was required to perform his duty with 'scrupulous exactitude.'"[209] The court went on to add that the Magistrate's review of the affidavits supplied by the District Attorney's Office were insufficient as a matter of law because they "contained only an itemized list of sexual acts, and the police officer's conclusory assertion that the list represented the 'content and character' of the films or that such scenes appeared 'throughout' the films."[210] As the opinion gave no inclination as to the artistic value, story line, or Judge Simons' opinion of the films "California Valley Girls," "Taboo I," Taboo II," "All American Girls," and "Debbie Does Dallas," it is difficult to imagine any further detail with regard to these "movies" that was not depicted in the affidavits drafted by the District Attorney's Office.

The court's decision in *P.J. Video* seems to imply that a judge issuing a search warrant requesting a search of material presumptively protected by the First Amendment must view, in its entirety, all items contained in the warrant. Judge Simons stated that because the Magistrate "had permitted the police officer to make the determination for him that the films as a whole appealed predominantly to prurient sex and lacked value," he lacked probable cause to support the issuance of the warrant.[211] Attempting to justify this more rigorous standard, Judge Simons

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[208] *Id.* at 299, 501 N.E.2d at 558, 508 N.Y.S.2d at 909. Strangely, however, nowhere in the Supreme Court's opinion did they ask the Court of Appeals to look at their State Constitution to determine whether it diverged from the U.S. Constitution. Additionally, the original Court of Appeals decision only mentioned the New York State Constitution once.

[209] *Id.* at 300, 501 N.E.2d at 557, 508 N.Y.S.2d at 909 (citation omitted).

[210] *Id.* at 301, 501 N.E.2d at 559, 508 N.Y.S.2d at 910.

[211] *Id.* (citation omitted).

first recognized that the language in the Fourth Amendment and Article I, § 12 of the New York State Constitution are identical. Judge Simons, relying upon a "noninterpretive" analysis, which purportedly examines the history of the "right" and the tradition of the State as well as distinctive attitudes of the citizens, concluded that a more exacting standard of probable cause was necessary. Judge Simons held that a higher standard "reflect[s] a concern, that the Fourth Amendment rules governing police conduct have been muddied, and judicial supervision of the warrant process diluted, thus heightening the danger that our citizens' rights against unreasonable police intrusions might be violated."[212]

Thus, not only has the Court of Appeals declined to adopt the "totality of the circumstances" approach established in *Gates*,[213] the Court of Appeals has also imposed a stricter standard for the issuance of a search warrant where the proceeds of such warrant contain material presumptively protected by the First Amendment. Because the issuing judge must review the warrant application with "scrupulous exactitude," not relying upon an affidavit from the District Attorney's Office, and viewing or reading the material presumably covered by the First Amendment, the search warrant process in this area has become extremely difficult. In areas such as computer crime and child pornography, such an exacting standard of probable cause for material presumptively protected by the First Amendment will make law enforcement in these areas particularly difficult. In order to obtain a search warrant in this area, the Court of Appeals requires a showing that criminal activity is *actually* taking place, rather than the typical standard of showing that there exists probable cause or a substantial chance that such criminal activity exists.

IV. AUTOMOBILE SEARCHES AND SEIZURES

The New York Court of Appeals has dramatically diverged from the standards set by the United States Supreme Court in the area of

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[212] *Id.* at 305, 501 N.E.2d at 562, 508 N.Y.S.2d at 913.

[213] Illinois v. Gates, 462 U.S. 213 (1983). *See supra* notes 168-197 and accompanying text.

automobile searches and seizures. Three New York Court of Appeals' cases demonstrate the inconsistencies involved in this area of search and seizure law. Basing their decisions on independent state grounds, the New York Court of Appeals, in *People v. Belton,*[214] *People v. Class,*[215] and *People v. Torres*[216] chose not to follow the framework established by the United States Supreme Court. More importantly, each decision expanded the rights of criminal defendants when police search an automobile and recover incriminating evidence.

In *People v. Belton*[217] [hereinafter "*Belton I*"], the New York Court of Appeals reversed the lower court's conviction of Belton for attempted possession of a controlled substance in the sixth degree, and granted his motion to suppress evidence seized by state troopers. On appeal, the Supreme Court of the United States, in *New York v. Belton,*[218] reversed the decision of New York's highest court. On remand, the Court of Appeals, while upholding Belton's conviction, rejected the Supreme Court's rationale thus expanding the rights of criminal defendants further than the Supreme Court envisioned.

In *Belton I*, Belton and three passengers were speeding on the New York State Thruway when they passed a state trooper who was traveling in another lane. The trooper overtook Belton's vehicle and signaled for Belton to pull over to the side of the road. As the lone trooper approached the stopped vehicle, he noticed the smell of marijuana emanating from the vehicle. The trooper requested to see Belton's driver's license and automobile registration and discovered that none of the four men owned the vehicle or was related to the owner. The trooper then peered into the vehicle and observed an envelope on the floor of the automobile which he recognized as the type that is typically used to sell marijuana. Accordingly, the trooper ordered all of the occupants out of the car, subjected them to a pat-down frisk, and removed the

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[214] 55 N.Y.2d 49, 432 N.E.2d 745, 447 N.Y.S.2d 873 (1982).
[215] 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986).
[216] 74 N.Y.2d 224, 543 N.E.2d 61, 544 N.Y.S.2d 796 (1989).
[217] 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S.2d 447 (1980).
[218] 453 U.S. 454 (1981).

envelope from the car. Upon inspection, the trooper discovered that the envelope, in fact, contained marijuana, and he placed the four occupants under arrest. The trooper then re-entered the vehicle to conduct a search of the passenger compartment and seized several marijuana cigarette butts that were lying in the ashtray. The trooper also checked the pockets of several jackets that were lying on the back seat, discovering a small amount of cocaine and defendant's identification in one of them.

Belton pleaded guilty to attempted possession of a criminal substance in the sixth degree after the court denied his motion to suppress the cocaine. A unanimous Appellate Division affirmed, holding the warrantless search of the jacket permissible as incident to the defendant's arrest for possession of marijuana. Belton appealed to the New York Court of Appeals.

In *Belton I,* the New York Court of Appeals held that the warrantless search of the zippered pocket of Belton's jacket could not be upheld as a search incident to a lawful arrest. The court rationalized that once Belton was removed from his car and placed under arrest, only a search of his person and the area within his immediate control; the area within which "defendant might gain possession of a weapon or destructible evidence,"[219] was permissible under the Fourth Amendment and that Belton's jacket was not within this area.[220] Further, the court stated that a warrantless search of objects under the exclusive control of the police can no longer be justified as incident to an arrest. Specifically, the court adopted a bright line rule stating, "once [the] defendant had been removed from the automobile and placed under arrest, a search of the interiors of a private receptacle safely within the exclusive custody and control of the police may not be upheld as incident to his arrest."[221]

In so holding, the New York Court of Appeals dismissed the factual determination of the two lower courts that at the time the

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[219] *Belton*, 50 N.Y.2d at 450, 407 N.E.2d at 422, 429 N.Y.S.2d at 576 (1980).

[220] *Id. See* Chimel v. California, 395 U.S. 752 (1969).

[221] *Belton*, 50 N.Y.2d at 452, 407 N.E.2d at 423, 429 N.Y.S.2d at 577 (citations omitted).

jacket was searched, the arrest process was still in progress "and neither the suspects themselves nor their property had as yet been reduced to the exclusive control of the police."[222] The New York Court of Appeals retrospectively substituted the judgement of the trooper on the scene with its own judgment. Judge Gabrielli in his dissent stated:

> [t]he majority believes that since the [four] suspects were standing outside the car at the time of the search and had been told that they were under arrest, both their persons and their property had thereby been conclusively and safely reduced to the complete control of the officer, as a matter of law. Although one might well wish that all criminal suspects could so readily be subdued as a matter of law, I cannot agree with a decision that requires a police officer to stake his very life upon such a questionable presumption.[223]

On appeal, the Supreme Court of the United States disagreed with the New York Court of Appeals finding that the jacket, as it lay on the back seat of the car, was out of the immediate control of Belton. In upholding the search of Belton's jacket pocket, the Supreme Court stated that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach in order to grab a weapon or evidentiary item."[224] Moreover, the Court noted the need for a "single, familiar standard" to guide police officers on the street who are forced to make important decisions regarding "[the] balance [of] social and individual interests involved in the specific circumstances they confront" in an extremely limited time.[225] The Court concluded by holding that an officer who has made an arrest of an occupant of a vehicle may, incident to that arrest, search the passenger

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[222] *Id.* at 454, 407 N.E.2d at 424, 429 N.Y.S.2d at 578 (Gabrielli, J., dissenting).

[223] *Id.* at 455, 407 N.E.2d at 425, 429 N.Y.S.2d at 579 (Gabrielli, J., dissenting).

[224] *Belton*, 435 U.S. at 460 (citing Chimel v. California, 395 U.S. 752, 763 (1969)).

[225] *Id.* at 458 (citing Dunaway v. New York, 442 U.S. 200, 213-14 (1979)).

compartment of that vehicle and search the contents of any containers found therein.

On remand, the New York State Court of Appeals refused to adopt the Supreme Court's holding, stating, "[w]e do not find it necessary to consider the Supreme Court's rationale as applied to our [state] Constitution."[226] Instead, the Court of Appeals criticized the Supreme Court's interpretation of their own decision in *Chimel v. California*,[227] stating that the Court had departed from its rationale in *Chimel*, and that "once the [lawful search incident to arrest] exception is employed to justify a warrantless search for objects outside an arrested person's reach it no longer has any distinct spatial boundary."[228] The Court of Appeals, however, chose to uphold the validity of the search of the jacket pocket under the automobile exception to the warrant requirement.

The majority decision in the *Belton* remand was forcefully criticized by Judge Gabrielli who concurred in the result writing, "the majority expressly rejects the rationale articulated by the Supreme Court, under the banner of our State Constitution, and upholds the search leading to defendant's conviction upon an independent rationale not addressed or mentioned by the majority on the previous appeal to this court."[229] Judge Gabrielli went on to accuse the court of imposing restrictions upon legitimate and acceptable police activity not prohibited by the State Constitution, stating, "[o]ur power to interpret the State Constitution is not tantamount to the power to legislate."[230] Judge Gabrielli continued by reminding his associates of their recent decision in *People v. Ponder*[231] where a unanimous court held that "section 12 of article I of the New York State Constitution conforms with the Fourth Amendment regarding the proscription against unreasonable searches and seizures, and [that] this identity of language supports a

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[226] *Belton*, 55 N.Y.2d at 51, 432, 432 N.E.2d at 745, 447 N.Y.S.2d at 874.
[227] 395 U.S. 752 (1969).
[228] *Belton*, 55 N.Y.2d at 53, 432 N.E.2d at 747, 447 N.Y.S.2d at 875.
[229] *Id.* at 56, 432 N.E.2d at 749, 447 N.Y.S.2d at 877.
[230] *Id.* at 57, 432 N.E.2d at 749, 447 N.Y.S.2d at 877.
[231] 54 N.Y.2d 160, 429 N.E.2d 735, 445 N.Y.S.2d 57 (1981).

policy of uniformity in both State and Federal courts."[232] In closing, Judge Gabrielli stated that if a police officer conducts himself within the mandate of the Fourth Amendment, his actions should not be found impermissible under the State Constitution.[233]

The effect of the Court of Appeals rationale in *Belton* can readily be observed by the court's decision in *People v. Gokey*.[234] In *Gokey*, police boarded a bus with an arrest warrant for Gokey on a larceny charge. Accompanying the three police officers was a canine sniff dog. As Gokey got off the bus he was placed under arrest. Gokey placed a duffle bag he was carrying between his legs. The dog indicated that the bag contained an illegal substance. Gokey was handcuffed and the bag was searched revealing eleven ounces of marijuana. Gokey pleaded guilty to criminal possession of marijuana in the third degree and the appellate division affirmed. The Court of Appeals, relying on its interpretation in *Belton* reversed the conviction. The Court of Appeals stated that the Supreme Court's interpretation in *Belton* provided a general rule that "a custodial arrest will always provide sufficient justification for police to search any container within the immediate control of the arrestee. [And] [u]nder this standard, it is clear that defendant's Federal constitutional rights were not violated."[235] The Court of Appeals proceeded, however, to "[decline] to interpret the State Constitution's protections against unreasonable searches and seizures so narrowly."[236] Thus, the Court of Appeals reversed the conviction in *Gokey* because the police, in the opinion of the court, did not fear for their safety, and therefore could not have reasonably believed that the search of the bag was necessary. It is clear that had New York adopted the bright line test enunciated in *Belton,* Gokey's conviction would have been upheld.

People v. Class[237] also demonstrates the Court of Appeals divergence from the Supreme Court in the area of automobile

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[232] *Id.* at 165, 429 N.E.2d at 737, 445 N.Y.S.2d at 59. *See Belton*, 55 N.Y.2d at 57, 432 N.E.2d at 749, 447 N.Y.S.2d at 877.

[233] *Belton*, 55 N.Y.2d at 58, 432 N.E.2d at 750, 447 N.Y.S.2d at 877.

[234] 60 N.Y.2d 309, 457 N.E.2d 723, 469 N.Y.S.2d 618 (1983).

[235] *Id.* at 312, 457 N.E.2d at 724, 460 N.Y.S.2d at 619.

[236] *Id.*

[237] 63 N.Y.2d 491, 472 N.E.2d 1009, 483 N.Y.S.2d 181 (1984).

searches and seizures. In *Class,* police observed a car which was speeding and which had a cracked windshield (both traffic violations). The police directed Class to pull over. Class immediately exited the automobile, approached the patrol car, and provided the officer with his registration and proof of insurance, but failed to provide his driver's license. In the meantime, a second officer approached Class's vehicle, and checked the door jam for the vehicle identification number [hereinafter "VIN"]. No VIN was found. In an effort to locate the VIN, the officer reached into the car and moved some papers revealing the handle of a gun that was protruding from underneath the seat. The weapon was seized and Class was arrested.

The Bronx County Supreme Court denied Class' motion to suppress the gun as evidence, concluding that although the officers had no reason to believe the automobile was stolen, their actions were nonetheless reasonable "in light of defendant's immediately exiting the car and walking over to the police car, instead of waiting in the automobile, coupled with the fact that the defendant did not have a driver's license in his possession."[238] Class subsequently pleaded guilty to criminal possession of a weapon in the third degree and was sentenced to five years probation. The Appellate Division of the Supreme Court, First Department, affirmed the conviction.

The New York Court of Appeals reversed the two lower courts and ruled to suppress the gun as evidence, holding that "a police officer's non-consensual entry into an individual's automobile to determine the VIN violates the Federal and State Constitutions where it is based solely on a stop for a traffic infraction."[239] The court reasoned that there exists many areas inside a car, such as underneath the seats, which cannot be viewed from outside the vehicle, and in which the owner of the car retains a legitimate expectation of privacy. When the officer reached into the vehicle to determine the VIN, such hidden areas were exposed, leading to the discovery of the gun.[240] Additionally, the court found that the

[238] *Id.* at 494, 472 N.E.2d at 1011, 483 N.Y.S.2d at 183.
[239] *Id.* at 493, 472 N.E.2d at 1010, 483 N.Y.S.2d at 182.
[240] *Id.* at 495, 472 N.E.2d at 1011, 483 N.Y.S.2d at 183.

lower court erred, as a matter of law, in finding reasonable suspicion of criminality. The Court of Appeals stated that the driver's emergence from his car upon being pulled over by police, combined with his failure to produce a driver's license were not indicative of criminality, and therefore, the officers possessed no justification for their search.[241]

On certiorari, the Supreme Court of the United States, in *New York v. Class,*[242] reversed the Court of Appeals decision, holding that the search of Class' vehicle was "constitutionally permissible in light of the lack of a reasonable expectation of privacy in the VIN and the fact that the officers observed respondent commit two traffic violations."[243]

The Supreme Court, while admitting that there was no reason for suspecting that Class' vehicle was stolen, or that he had committed any offenses other than those for which he was pulled over, reasoned that due to the important role played by the VIN in the government's regulation of automobiles, as well as the government's efforts in ensuring that the VIN is placed in plain view in all vehicles, Class retained no reasonable expectation of privacy in the VIN.[244] Moreover, the Court stated that the ensuing "search" for the VIN was constitutionally permissible. The majority reasoned that, if Class had remained in his vehicle, the officers would have been justified in requesting that he remove the papers covering the VIN.[245] Accordingly, because Class immediately exited his car, and "[i]n light of the danger to the officers' safety that would have been presented by returning [defendant] immediately to his car . . . the search to obtain the VIN" was constitutional.[246] The court concluded by noting the overall reasonableness of the search:

> The officer did not root about the interior of respondent's automobile before proceeding to examine the VIN. He did

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[241] *Id.* at 496, 472 N.E.2d at 1012, 483 N.Y.S.2d at 184.
[242] 475 U.S. 106 (1986).
[243] *Id.* at 119.
[244] *Id.* at 114.
[245] *Id.* at 115.
[246] *Id.* at 116.

> not reach into any compartments or open any containers. He did not even intrude into the interior at all until after he had checked the door jam for the VIN. When he did intrude, the officer simply reached directly for the unprotected space where the VIN was located to remove the offending papers. [Accordingly] . . . the search was . . . constitutionally permissible.[247]

On remand, the New York Court of Appeals, in *People v. Class,*[248] reversed the order of the Supreme Court of the United States, noting that when the case was first before the court, it was held that Article I, § 12 of the State Constitution was violated by the search. In so holding, the state court failed to mention or address the reasoning of the country's highest court, stating simply, "we have already held that the State Constitution has been violated, [and] we should not reach a different result following reversal on Federal constitutional grounds."[249]

Once again, the New York Court of Appeals holding in *People v. Class*[250] disregarded a ruling by the Supreme Court of the United States, reprimanded police officers for taking adequate precautions in protecting the safety of the public at large, and granted criminals in New York State broader constitutional protections than those mandated by the United States Constitution.

Michigan v. Long[251] is a further example of the Court of Appeals' reluctance to follow the Supreme Court in the area of automobile searches and seizures. In *Long,* two police officers observed a vehicle traveling erratically and at an excessive rate of speed. The car proceeded to swerve into a ditch and the officers stopped to investigate. Long exited his vehicle and met the officers at the rear of his car. The officers later testified that Long appeared to be under the influence of drugs or alcohol and did not respond to the officers requests to produce his license and registration. Long walked towards the open door of his car and the officers followed

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[247] *Id.* at 118-19.
[248] 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986).
[249] *Id.* at 433, 494 N.E.2d at 445, 503 N.Y.S.2d at 314.
[250] 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986).
[251] 463 U.S. 1032 (1983).

behind him. Upon arriving at the door, the officers observed a hunting knife on the floorboard of Long's car, stopped him, and subjected him to a frisk. One of the officers then proceeded to shine a flashlight into the vehicle and saw an object protruding from under the armrest. Upon lifting the armrest, the officer found an open pouch that contained marijuana and Long was arrested.

On certiorari, the Supreme Court upheld the officers' search of the passenger compartment of the car, stating that such protective searches during an investigative detention are constitutionally permissible under the principles articulated in *Terry v. Ohio* and other cases.[252] The Court stressed the fact that if the suspect is not placed under arrest he will be free to reenter his vehicle and will then have access to any weapons therein.[253]

In its opinion in *Long*, the Supreme Court adopted a framework for police to follow when conducting searches of individuals stopped alongside their automobile. The Court held that when an officer has a reasonable belief,

> that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon.[254]

The Court went on to note that roadside encounters between police and suspects are particularly dangerous due to the possible presence of weapons in the area surrounding a suspect, and that when a full custodial arrest has not been made in such a situation, the officer is forced to make a quick decision as to how to protect himself and others.[255] Accordingly, the Court upheld the search of Long's automobile.

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[252] *Id.* at 1035.
[253] *Id.* at 1052.
[254] *Id.* at 1047 (quoting Terry v. Ohio, 392 U.S. 1 (1968)).
[255] *Id.* at 1052.

In *People v. Torres*,[256] the New York Court of Appeals refused to adopt the approach articulated in *Long*. Although the facts in *Torres* differ from those of *Long*, the situation which arose during the encounter between the officer and Torres was quite similar to that of the officer and Long. In *Torres*, police received a tip from an anonymous caller that an individual who was wanted on homicide charges could be found having his hair cut at a certain barbershop in Manhattan. The caller described the suspect as a large, six-foot tall Hispanic male wearing a white sweater, driving a black Eldorado, and carrying a gun in a shoulder bag.

Two plain clothes detectives arrived at the location and observed Torres leave the barbershop with another man and enter a black Eldorado. Torres, who fit the anonymous caller's description, was wearing a white sweater and carrying a shoulder bag. The officers approached the vehicle with guns drawn and ordered the occupants to exit the car and immediately frisked them. While one detective was still conducting the pat down of Torres, the other reached into the automobile and took out the shoulder bag from the front seat. Due to its unusual weight, the officer felt the outside of the bag and discerned the shape of a gun. The officer unzipped the bag and discovered a revolver.

Torres pleaded guilty to criminal possession of a weapon in the third degree after the hearing court denied his motion to suppress. The trial court held that the anonymous tip, coupled with the observations of the officers on the scene, was sufficient to justify the detective's intrusive actions. The decision, however, was reversed by the New York Court of Appeals.

In *Torres*, the Court of Appeals concluded that the Supreme Court's interpretation in *Michigan v. Long* of *Terry v. Ohio*, was inconsistent with the rights guaranteed by the New York State Constitution; and that

> once the detectives had frisked the two men, and had thereby satisfied themselves that there was no immediate threat to their safety, there was, as a matter of law, no justification for conducting a further . . . search extending

[256] 74 N.Y.2d 224, 543 N.E.2d 61, 544 N.Y.S.2d 796 (1989).

> to the removal of personal effects from the front seat of the car.[257]

Further, the state court mocked the majority of the Supreme Court, stating:

> [i]t is unrealistic to assume, as the Supreme Court did in *Michigan v. Long*, that having been stopped and questioned without incident, a suspect who is about to be released and permitted to proceed on his way would, upon reentry into his vehicle, reach for a concealed weapon and threaten the departing officer's safety. Certainly, such a far fetched scenario is an insufficient basis upon which to predicate the substantial intrusion that occurred here.[258]

The majority of New York's highest court condemned the police officers precautionary procedures, stating with sarcasm the absurdity of a scenario wherein defendant, *a murder suspect*, allowed to return to his vehicle, retains his gun and fires upon the police officer's on the scene.

The fallacy of the majority's perception of the police encounter in the instant case was addressed by Judge Bellacosa in dissent. Bellacosa stated:

> The finely spun and bifurcated analysis of the majority may work in the cloister, but it does not work and is not warranted for the hard streets. *The dangers may be "far-fetched" to judges in the protected enclave of the courthouse, but not to cops on the beat.*[259]

In fact, the ruling of the majority prohibits the police, on the beat and in an extremely dangerous encounter with an armed felon, from *completing* "their concededly lawful approach and frisk by unrealistically and unnecessarily curtailing the officer's authority to reach for and secure the reported weapon to ensure

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[257] *Id.* at 227, 543 N.E.2d at 63, 544 N.Y.S.2d at 798.
[258] *Id.* at 230-231.
[259] *Id.* at 232 (Bellacosa, J., dissenting).

their own contemporaneous safety."[260] The precedent developed in *Torres* has led to the suppression of incriminating evidence in numerous cases in New York.[261]

In essence, the *Torres* decision instructs a police officer, who has removed a *murder suspect* from his automobile and who has *reasonable suspicion* that such suspect has a *deadly weapon* in the passenger compartment of the vehicle, to either arrest the suspect, or simply allow the individual to return to his car wherein his weapon remains, and have faith that such an individual will simply drive away.[262] The New York Court of Appeals' decisions in the area of automobile searches and seizures has not only placed officers who make routine traffic stops in danger, but has also caused incriminating evidence, to be suppressed. In a situation where an officer stops a car based upon reasonable suspicion and then, based upon his training and experience suspects that criminal activity may be afoot, the New York Court of Appeals has greatly undermined the ability of the officer to investigate the situation and dispel any possible danger. The imposition of such rigorous standards to protect the right of New York drivers and their passengers has meant that ultimately

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[260] *Id.*

[261] *See, e.g.*, People v. Stewart, 199 A.D.2d 1043, 606 N.Y.S.2d 484 (4th Dep't 1993); People v. Mullins, 196 A.D.2d 894, 602 N.Y.S.2d 156 (2nd Dep't 1993); People v. Snyder, 178 A.D.2d 757, 577 N.Y.S.2d 678 (3d Dep't 1991); People v. Pena, 155 A.D.2d 310, 547 N.Y.S.2d 282 (1st Dep't 1989); People v. Theodis, 155 A.D.2d 339, 547 N.Y.S.2d 310 (1st Dep't 1989).

[262] Two recent decisions by the Court in the area of automobile stops also highlights the Supreme Court's trend in expanding law enforcement's ability to conduct more expansive road side stops, searches, and seizures. In Whren v. United States, 517 U.S. 806 (1996), the Court upheld the stop of a car by a police officer based upon pre-text. The holding in *Whren* has not been acknowledged by the Court of Appeals as of yet; however, lower courts in New York have held that a traffic violation may not be utilized as a pre-text to investigate an individual on an unrelated matter. Additionally, the Court in Maryland v. Wilson, 117 S. Ct 882 (1997), held that an officer who makes a traffic stop may order passengers to get out of the car pending investigation. Taken in conjunction, the two recent Supreme Court cases have the practical effect of permitting officers to stop any car violating any traffic law and order the driver and passengers out of the car under the pre-text of conducting a further investigation.

criminal activity goes undetected or criminals are released by judges who are compelled to suppress the incriminating evidence due to the precedent established by the Court of Appeals' interpretation of Article I, § 12 of the New York State Constitution.

V. SEARCHES WITHIN THE HOME

The following set of cases clearly indicate the divergence between the United States Supreme Court and the New York Court of Appeals' with respect to what types of searches of the home are constitutionally protected. *Payton v. New York*[263] and *New York v. Harris*[264] demonstrate how the New York Court of Appeals declined to follow the precedent established by the highest court in the land. Instead, the Court of Appeals has extended greater rights than those afforded by the Fourth Amendment to the United States Constitution. This area of Fourth Amendment jurisprudence also illustrates how in recent years the Supreme Court has further restricted the rights of criminal defendants while in direct contrast, the New York Court of Appeals has enlarged their rights.

In 1978, the New York Court of Appeals in *People v. Payton*[265] affirmed the conviction of two defendants after the police made a warrantless entry into their home and discovered incriminating evidence in plain-view. The Supreme Court granted certiorari[266] and reversed the Court of Appeals, holding that a warrantless, nonconsensual entry into a suspect's home to make a routine felony arrest, violates the Fourth Amendment.[267] The Court's 1980 decision was written by Justice Stevens and joined by Justices Brennan, Stewart, Marshall, Blackmun, and Powell. Chief Justice Burger and Justices White and Rehnquist dissented. Ten years later, in *New York v. Harris*,[268] the Supreme Court refused to

[263] 445 U.S. 573 (1980).
[264] 495 U.S. 14 (1990).
[265] 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395 (1978).
[266] 439 U.S. 1044 (1980).
[267] *Payton*, 445 U.S. at 603.
[268] 495 U.S. 14 (1990).

expand the rule developed in *Payton* and held that the Fourth Amendment's exclusionary rule does not bar the prosecution from using a statement made by a suspect at a police station after the police entered the suspect's home and arrested him without a warrant. Ten years of Republican administrations have altered the composition of the Supreme Court. The opinion in *Harris*, demonstrated the power of the Court's new conservative alignment. The Court's opinion was authored by Justice White and joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. The dissent was authored by Justice Marshall and joined by Justices Brennan, Blackmun and Stevens.

When *Harris* was remanded, the New York Court of Appeals held on independent state grounds, that the "Supreme Court rule does not adequately protect the search and seizure rights of citizens of New York." This, only ten years after holding that a warrantless, nonconsensual entry into a suspect's home to make a routine felony arrest did not violate the Fourth Amendment. The New York Court of Appeals held that the "State Constitution requires that statements obtained from an accused following a *Payton* violation must be suppressed . . . ."[269]

The decision in *Payton* combined two different cases[270] with similar facts and the identical legal issue. In the first fact scenario, the police suspected Theodore Payton of murdering the manager of a gas station during the commission of an armed robbery.[271] Two days later, two eyewitnesses to the homicide came forward and identified Payton as the killer. Additionally, one of the witnesses gave the police Payton's address. Thereafter, the police went to

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[269] People v. Harris, 77 N.Y.2d 434, 437, 570 N.E.2d 1051, 1053, 568 N.Y.S.2d 702, 704 (1991). Justice Stevens was particularly pleased with the Court of Appeals decision, writing to Justice Marshall, "[i]n view of your characteristically excellent dissent in New York v. Harris, I think you might enjoy the opinion of the Court of Appeals on remand." *See* Marshall Papers, dated February 22, 1991, Library of Congress, Washington, D.C.

[270] Payton v. New York, 445 U.S. 573 (1980); Riddick v. New York, 445 U.S. 573 (1980).

[271] People v. Payton, 45 N.Y.2d 300, 305, 380 N.E.2d 224, 226, 408 N.Y.S.2d 395, 396 (1978)

Payton's home to make an arrest.[272] The police did not secure a warrant as warrantless and forcible entry was authorized by §177 of the New York Code of Criminal Procedure which stated, "A peace officer may, without a warrant, arrest a person . . . [w]hen a felony has been committed, and he has reasonable cause for believing the person to be arrested to have committed it."[273] Section 178 of the code stated that, "To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance."[274] In *Payton*, the police knocked on the door, but there was no response. After noticing that there were lights and music on in the apartment, the police, approximately 30 minutes later, used a crowbar to break open the door and enter the apartment.[275] The apartment was unoccupied and the police found, in plain view, a .30 caliber shell casing that was seized and later used in the successful murder prosecution of Payton.[276]

Similarly, the second of the consolidated cases involved a warrantless arrest for a felony. The police suspected Obie Riddick was the perpetrator of two armed robberies, after he had been identified by the victims.[277] After learning Riddick's address, the police went to arrest him, without first obtaining an arrest warrant. Although the New York Code of Criminal Procedure had been revised by the recently adopted New York Criminal Procedure Law, section 140.15(4) of the revised law, still permitted the police to arrest a defendant in his home without a warrant under certain circumstances. Pursuant to the new statute, the police went to Riddick's home and knocked on the door.[278] Riddick's young son opened the door permitting the officers to enter where they found Riddick in bed. Riddick was placed under arrest. The police searched Riddick's drawers located two feet from the bed for weapons. No weapons were recovered but narcotics and other drug

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[272] *Id.*
[273] N.Y. CRIM. PROC. LAW § 177 (McKinney 1993).
[274] N.Y. CRIM. PROC. LAW § 178 (McKinney 1993).
[275] *Id* at 305, 380 N.E.2d at 226, 408 N.Y.S.2d at 397.
[276] *Id.* at 306, 380 N.E.2d at 226, 408 N.Y.S.2d at 397.
[277] *Id.* at 307, 380 N.E.2d at 227, 408 N.Y.S.2d at 397.
[278] *Id.* at 307, 380 N.E.2d at 227, 408 N.Y.S.2d at 398.

paraphernalia were found.[279] Riddick was thereafter indicted on narcotics charges while his suppression motion was denied.[280]

The New York Court of Appeals affirmed both convictions and held that the Fourth Amendment does not require police to secure a warrant when they enter a suspect's home, with probable cause, in order to make a routine felony arrest.[281] Specifically, the court held that:

> [A]n entry made for the purpose of effecting a felony arrest within the home of the person to be arrested by a police officer who has entered without permission of the owner, if based on probable cause, is not necessarily violative of the constitutional right to be secure against unreasonable searches and seizures even though the arresting officer has not obtained a warrant and there are no exigent circumstances.[282]

The Court of Appeals based its decision on the perceived difference between a search of the home and entering the home for the purpose of arresting an individual for a felony.[283] The court stated that there was:

> no sufficient reason for distinguishing between an arrest in a public place and an arrest in a residence. To the extent that an arrest will always be distasteful or offensive, there is little reason to assume that arrest within the home is any more so than arrest in a public place; on the contrary, it may well be that because of the added exposure the latter may be more objectionable.[284]

The court also based its decision on the historical acceptance of warrantless arrests in an individual's home and the statutory

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[279] *Id.*

[280] *Id.* at 307-08, 380 N.E.2d at 227, 408 N.Y.S.2d at 398.

[281] *Id.* at 305, 380 N.E.2d at 225, 408 N.Y.S.2d at 396.

[282] *Id.*

[283] *See Payton*, 45 N.Y.2d at 310, 380 N.E.2d at 228-29, 408 N.Y.S.2d at 399.

[284] *Id.* at 310-311, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.

authority in the Code of Criminal Procedure.[285] Finally, the court went on to add that, despite other federal courts reaching an opposite ruling concerning this issue, "[absent] an explicit determination by the Supreme Court which would permit us no alternative, we hold that the entries made by the police in the cases before us did not violate defendants' constitutional protections against unreasonable searches and seizures."[286] The New York Court of Appeals in 1978 obviously interpreted the New York State Constitution dramatically differently than the same Court in the 1980's and 90's.

The United States Supreme Court disagreed with the Court of Appeals and based its decision on an interpretation of the history of the Fourth Amendment.[287] The Supreme Court overruled the Court of Appeals and reversed the convictions of Payton and Riddick, holding that the warrantless, nonconsensual entry into their homes by the police to make a routine felony arrest was in violation of their Fourth Amendment rights.

In 1989, the court confronted the issue of whether a defendant's confession should be suppressed after the police, *without a warrant*, arrested the defendant for a felony in his home and brought him to the police precinct where he gave an incriminating statement. The same court that had ruled, ten years earlier, that the police did not even need a warrant to arrest an individual in his home, held in *People v. Harris,*[288] that the confession should be suppressed as it was the result of an arrest, without a warrant, that violated the defendant's Fourth Amendment rights.

Bernard Harris murdered his ex-girlfriend by stabbing her to death.[289] The police found the victim's dead body on January 11, 1984, and shortly thereafter developed probable cause to believe that Harris was the murderer. Five days after the murder, the police went to Harris' apartment to arrest him. The police,

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[285] *Id.* at 311, 380 N.E.2d at 229-30, 408 N.Y.S.2d at 400-01.
[286] *Id.* at 312, 380 N.E.2d at 230, 408 N.Y.S.2d at 401.
[287] *See Payton*, 445 U.S. at 583-98.
[288] 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1 (1988).
[289] *Id.* at 616, 532 N.E.2d at 1229, 536 N.Y.S.2d at 1.

however, did not have a warrant.[290] After knocking on the door a number of times, Harris finally answered the door and permitted the officers to enter his apartment.[291] Harris stated that he was glad the police had come for him, and was read his Miranda rights. Harris acknowledged that he understood his rights, and proceeded to pour himself a glass of wine. Thereafter, Harris admitted that he had killed his ex-girlfriend with a knife. "He was arrested, taken to the station house where he was again given Miranda warnings, and made [a] written inculpatory statement . . . ."[292] After writing the statement, Harris proceeded to give a full statement on videotape admitting that he murdered his ex-girlfriend.[293] Before giving the videotaped statement, Harris stated, "well I really don't know what to say right now . . . I have said all I can say."[294] Prior to trial, a hearing was held to determine the admissibility of all three statements given by Harris. The trial court suppressed the statement made in Harris' home as the product of an arrest that was made in violation of his Fourth Amendment rights.[295] The court also suppressed the videotaped statement finding that Harris had invoked his right to remain silent.[296] The court, however, denied Harris' motion to dismiss the written statement given at the precinct because it was given after Miranda warnings and with a waiver of his rights.[297] At Harris' trial, the prosecution's case-in-chief, elicited the confession which was given at the police station approximately one hour after he had been arrested at his home without a warrant.[298] Harris was convicted after a bench trial and the verdict was affirmed by a divided appellate division.[299] The New York Court of Appeals reversed the conviction relying on the Supreme Court's decision in *Payton*. The Court of Appeals

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[290] *Id.* at 617, 532 N.E.2d at 1230, 536 N.Y.S.2d at 2.
[291] *Id.*
[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.*
[298] *Id.*
[299] People v. Harris, 124 A.D.2d 472, 507 N.Y.S.2d 823 (1986).

analyzed the *Payton* decision, stating that *Payton*, "held that the fruits of illegal entries must be suppressed even though the police might have probable cause to conduct a search or effectuate an arrest outside the home without a warrant. Under the rule of *Payton*, this arrest was clearly illegal . . . ."[300] In order for the Court of Appeals to determine what, if any, evidence should be suppressed as a result of the police violating Harris' Fourth Amendment rights, the appeals court analyzed the "fruit of the poisonous tree" doctrine enunciated in *Wong Sun v. United States,*[301] and refined in *Brown v. Illinois*.[302]

The Court in *Brown* explicitly rejected a requirement that would suppress all statements made after the police violate a defendant's constitutional rights. In order to determine whether suppression is warranted, the Court held that three factors must be considered; the temporal proximity of the arrest and the confession, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct.

The Court of Appeals in *Harris* examined each of the three factors outlined in *Brown*. The Court of Appeals found that Harris' statement was taken only one hour after he had been illegally arrested,[303] and thus "[could not] serve to attenuate the illegality . . . ."[304] Moving to the second factor, the Court of Appeals found that there was no intervening factor to warrant the attenuation of the Fourth Amendment violation and the incriminating statement.[305] Finally, the appeals court examined the flagrancy of the official misconduct. The court found that the police made no attempt to obtain a warrant and thus the "police illegality was knowing and intentional . . . ."[306] Despite the Supreme Court's statement in *Payton* that the holding was derived from the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the

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[300] *Harris*, 72 N.Y.2d at 619, 532 N.E.2d at 1231, 536 N.Y.S.2d at 3-4.
[301] 371 U.S. 471 (1963).
[302] 422 U.S. 590 (1975).
[303] *Harris*, 72 N.Y.2d at 621, 532 N.E.2d at 1232, 536 N.Y.S.2d at 4-5.
[304] *Id.* at 621, 532 N.E. at 1233, 536 N.Y.S.2d at 5.
[305] *Id.*
[306] *Id.* at 622, 532 N.E.2d at 1233, 536 N.Y.S.2d at 6.

Republic,"[307] the Court of Appeals stated that other courts were incorrect in their belief that the "wrong in *Payton* cases . . . lies not in the arrest, but in the unlawful entry into a dwelling without proper judicial authorization."[308] Based upon these findings, the New York Court of Appeals held that the incriminating statement was not sufficiently attenuated from the illegal arrest, and thus reversed the appellate division, suppressing the incriminating statements made by Harris at the police precinct.

The United States Supreme Court granted certiorari to determine whether the statements made by Harris were in violation of his Fourth Amendment rights.[309] The Supreme Court's decision was written by Justice White and joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. The Court held that the exclusionary rule did not bar the statements made by Harris to the police at the precinct even though the police had entered his home without a warrant or consent.

The Court analyzed its decision in *Payton* and the rationale of the New York Court of Appeals. The Supreme Court disagreed with the reasoning of the New York Court of Appeals that the wrong in *Payton* lies with the arrest. The Supreme Court held in *Harris* that:

> [w]e decline to apply the exclusionary rule in this context because the rule in *Payton* was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime.[310]

The Court added that nothing in *Payton* "suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house."[311] Logically, therefore, the police were not required to release Harris and thus Harris had no valid claim that an illegal

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[307] *Payton*, 445 U.S. at 601.
[308] *Harris*, 72 N.Y.2d at 623, 532 N.E.2d at 1234, 536 N.Y.S.2d at 6.
[309] 490 U.S. 1018 (1989).
[310] People v. Harris, 495 U.S. 14, 17 (1990).
[311] *Id.* at 18.

search and seizure occurred. Therefore, when Harris was taken to the precinct, read his rights, and given the opportunity to speak, the Court found that he was lawfully in custody.[312] The Court concluded that:

> [t]he station house statement in this case was admissible because Harris was in legal custody . . . and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else.[313]

The Court went on to explain further that:

> [s]uppressing the statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal. The warrant requirement for an arrest in the house is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been; the purpose of the rule has thereby been vindicated.[314]

The Court, reversing the judgment of the New York Court of Appeals, refused to go further than the Constitutional requirements of the Fourth Amendment and suppress statements made by Harris in an effort to deter police from violating *Payton*.

The Court of Appeals subsequently disregarded the Court's decision in *Harris* and held that State constitutional provisions that prohibit searches and seizures require suppression when an individual is arrested at home without a warrant and later confesses at the police station.[315] It is extraordinary that only ten years earlier the New York Court of Appeals held that it was unnecessary for the police to obtain a warrant to arrest an individual for a felony in their home. The court held that not only is a warrant required to

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[312] *Id.*

[313] *Id.* at 20.

[314] *Id.*

[315] People v. Harris, 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991).

make a felony arrest in an individual's home,[316] but if such an arrest is made without a warrant, regardless of the existence of probable cause, a statement given by the defendant must be suppressed unless it is demonstrated that the statement was sufficiently attenuated from the *Payton* wrong. The decision in *Harris* has led to the suppression of numerous confessions.[317]

The New York Court of Appeals asserted that the "Supreme Court's rule does not adequately protect the search and seizure right of citizens of New York."[318] The Court of Appeals based its decision on their interpretation of Article I, §12 of The New York State Constitution. Although the court acknowledged that both Article I, § 12 and the Fourth Amendment were identical and that it is desirable to interpret them consistently, the court, without justification concluded that a "State court may adopt a different construction of a similar State provision unconstrained by a contrary Supreme Court interpretation of the Federal counterpart."[319] While states may legitimately grant greater rights, one would expect the Court of Appeals to illustrate a principled basis for such departure from the ruling of the highest court of the United States.

VI. SEARCHES OF COMMERCIAL PREMISES

The Fourth Amendment's prohibition against unreasonable searches and seizures has been held to apply to commercial premises as well as to private homes.[320] Thus, an owner or operator of a business has a reasonable expectation of privacy that society is prepared to recognize under Fourth Amendment analysis. This expectation of privacy, however, is less than the privacy

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[316] This position of the Court is clearly antithetical to their 1978 decision in Payton.

[317] *See, e.g.*, People v. Byas, 172 A.D.2d 242, 568 N.Y.S.2d 368 (1st Dep't 1991); People v. Medina, 161 Misc. 2d 484, 615 N.Y.S.2d 254 (Sup. Ct. Queens County 1994).

[318] *Harris*, 77 N.Y.2d at 437, 570 N.E.2d at 1052-53, 568 N.Y.S.2d at 703-04.

[319] *Id.* at 437-38, 570 N.E.2d at 1053, 568 N.Y.S.2d at 704.

[320] See v. City of Seattle, 387 U.S. 541 (1967).

afforded to an individual's home. The Supreme Court has held, in addition, that the expectation of privacy in "closely regulated" industries is even less than that of typical commercial premises. The "closely regulated" analysis developed from two cases which involved a "long tradition of close government supervision."[321] In *Colonnade Corp. v. United States*,[322] the Court upheld a warrantless search of catering businesses pursuant to a federal revenue statute authorizing the inspection of the premises of liquor dealers. In *United States v. Biswell*,[323] the Court upheld the warrantless inspection of a pawn shop operator who was federally licensed to sell weapons. Thus, the application of the *Colonnade-Biswell* holdings find that "closely regulated" businesses have a reduced expectation of privacy, and therefore, probable cause and warrant requirements of the Fourth Amendment are less stringent than normal.

In a later application of these holdings, the Court in *Donovan v. Dewey*[324] set forth three criteria that must be met before the warrantless inspection of a "closely regulated" business is found to be reasonable. First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made.[325] Second, the warrantless inspection must be "necessary to further [the] regulatory scheme."[326] Third, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant."[327]

In *New York v. Burger*,[328] the Court was confronted with the constitutionality of a New York statutory provision that permitted the warrantless search of an automobile junkyard in order to deter criminal behavior. In *Burger*, five officers entered Burger's

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[321] *See* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Donovan v. Dewey, 452 U.S. 594 (1981).

[322] 97 U.S. 72 (1970).

[323] 406 U.S. 311 (1972).

[324] 452 U.S. 594 (1981).

[325] *Id.* at 602.

[326] *Id.* at 600.

[327] *Id.* at 603.

[328] 482 U.S. 691 (1987).

junkyard to conduct an inspection pursuant to a statute authorizing the search of such premises.[329] The VIN numbers of vehicles and parts thereof were copied down by the officers.[330] Thereafter, the police checked those numbers against a police computer and determined that Burger was in possession of stolen vehicles and parts. Burger was arrested and charged with five counts of possession of stolen property. At the trial court, Burger moved to suppress the evidence on the basis that the statutory provision permitting these administrative inspections was unconstitutional. The trial court denied Burger's motion. The New York Court of Appeals reversed, and held that § 415-a5 violated the Fourth's Amendment's prohibition against unreasonable searches and seizures.[331] The Court of Appeals held that because the statutory provisions sole purpose is to undercover evidence of criminality, a search warrant is necessary.[332] The Supreme Court granted certiorari,[333] and held in a 6-3 decision, authored by Justice Blackmun, that § 415-a5 satisfies the "three criteria necessary" for closely regulated warrantless searches.[334] The Court found that "the State has a substantial interest in regulating the vehicle-dismantling and automobile-junkyard industry because motor vehicle theft has increased in the State and because the problem of

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[329] *Id.* at 693.; N.Y. VEH. & TRAF. LAW § 415-a5 (McKinney 1986). This provision provides in pertinent part:

> Upon request of an agent of the commissioner or of any police officer . . . a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises . . . . The failure to produce such records or to permit such inspection on the part of any person required to be registered pursuant to this section as required by this paragraph shall be a class A misdemeanor.

Id.

[330] *Burger,* 482 U.S. at 695.

[331] 67 N.Y.2d 338, 493 N.E.2d 926, 502 N.Y.S.2d 702 (1986).

[332] *Id.* at 344, 493 N.E.2d at 929, 502 N.Y.S.2d at 705.

[333] 479 U.S. 812 (1986).

[334] *Burger,* 482 U.S. at 708.

theft is associated with this industry."[335] Additionally, the Court found that "regulation of the vehicle-dismantling industry reasonably serves the State's substantial interest in eradicating automobile theft."[336] Finally, the Court held that the "time, place, and scope of the inspection is limited to place appropriate restraints upon the discretion of the inspecting officers."[337] Addressing the Court of Appeals finding that the statute was unconstitutional because it was "designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property,"[338] the Court held that the Court of Appeals, "failed to recognize that a State can address a major social problem both by way of administrative scheme and through penal sanctions."[339]

The New York Court of Appeals, however, refused to uphold the legitimacy of § 415-a5. In *People v. Keta*,[340] the court, per Judge Titone, stated that despite the Court's ruling in *Burger* "we - consistent with the well-settled principles of federalism - are not bound by decisions of the Supreme Court construing similar provisions of the Federal Constitution."[341] The Court went on to add that:

> [o]ur firm and continuing commitment to protecting the privacy rights embodied within article I, § 12 of our State Constitution leads us to the conclusion that Vehicle and Traffic Law § 415-a5(a)'s provisions for warrantless, suspicionless searches of business premises cannot withstand challenge under our State Constitution.[342]

Therefore, despite the Supreme Court's holding in *Burger* the Court of Appeals found it necessary to enhance the rights of New York citizens under the State Constitution, by striking down the statutory provision permitting warrantless searches of junkyard businesses.

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[335] *Id.*
[336] *Id.* at 709.
[337] *Id.* at 711 (citation omitted).
[338] *Burger*, 67 N.Y.2d at 344, 493 N.E.2d at 929, 502 N.Y.S.2d at 705.
[339] *Burger*, 482 U.S. at 712.
[340] 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).
[341] *Id.* at 495-96, 593 N.E.2d at 1341, 583 N.Y.2d at 933.
[342] *Id.* at 497, 593 N.E.2d at 1342, 583 N.Y.S.2d at 934.

The Court of Appeals failed to address how the decision affected the rights of those individuals whose automobiles are stripped or stolen. However, the Court did state that it was not their responsibility "to shape the law so as to advance the goals of law enforcement, but rather to stand as a fixed citadel for constitutional rights, safeguarding them against those who would dismantle our system of ordered liberty in favor of a system of well-kept order alone."[343]

The decision in *Burger* has dramatically limited the ability of law enforcement officers and prosecutors to monitor criminal activity in the automotive industry. It is highly likely that many criminal enterprises run by organized crime will go undetected. Businesses involved in automotive criminal activity now have the opportunity to sell car parts as well as register false insurance claims without concern of being subjected to a non-warrant investigatory check by the police.

VII. THE GOOD FAITH EXCEPTION

Once a court finds that the Fourth Amendment has been violated, a determination must be made as to whether the seized evidence should be suppressed. As early as 1914, the United States Supreme Court applied the judicially created exclusionary rule to bar evidence obtained as a result of a Fourth Amendment violation.[344] The exclusionary rule was created in an effort to deter violations of the Fourth Amendment.[345] The United States Supreme Court, however, has held that the exclusionary rule should not be applied in every instance where the Fourth Amendment has been violated.[346] A significant exception to the Fourth Amendment's

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[343] *Id.* at 501, 593 N.E.2d at 1345, 583 N.Y.S.2d at 937.

[344] *See* Weeks v. United States, 232 U.S. 383 (1914) (holding that evidence seized from defendant's home by federal officers without a search warrant was suppressed under the exclusionary rule). *See also* Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the exclusionary rule through the Fourteenth Amendment is applicable to the States).

[345] *See* United States v. Calandra, 414 U.S. 338, 348 (1974).

[346] *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (holding that a state prisoner who has been afforded a full and fair opportunity to litigate a Fourth

exclusionary rule was promulgated in *United States v. Leon.*[347] The Court held that the exclusionary rule does not bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. The good-faith exception was welcomed by law enforcement agencies across the United States. However, the New York Court of Appeals, in *People v. Bigelow*,[348] declined to apply the exclusionary rule exception.

In *Leon*, the Supreme Court confronted the highly anticipated issue of whether the Fourth Amendment's exclusionary rule, "should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."[349] In *Leon* an informant whose credibility was unknown, informed the local police that two persons were "selling cocaine and methaqualone from their residence."[350] In addition, the informant told the police that the persons were known to him as "Armando" and "Patsy" and lived at 620 Price Drive, Burbank, California.[351] The informant also told the police that he had personally witnessed the sale of methaqualone by Patsy several months prior at her residence. Moreover, the informant told the police that "Armando" and "Patsy" had only a small amount of drugs in their home, but stored larger amounts at another location. As a result of this information, the police began to investigate.

Amendment claim may not obtain federal habeas relief on the ground that unlawfully obtained evidence had been introduced at trial); United States v. Calandra, 414 U.S. 338 (1974) (holding that grand jury witnesses may not refuse to answer questions based on evidence obtained in violation of the Fourth Amendment); United State v. Janis, 428 U.S. 433 (1976) (holding that evidence illegally seized by state officials could be used in federal civil proceedings).

[347] 468 U.S. 897 (1984).

[348] 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985).

[349] *Leon,* 468 U.S. at 900.

[350] *Id.* at 901.

[351] *Id.*

After surveillance of the Price Drive residence, it was determined that Armando Sanchez, Patsy Stewart, and Ricardo Del Castillo often parked their cars outside this residence. Both Sanchez and Del Castillo had prior drug charges. On one occasion, police watched Del Castillo arrive at the Price Drive residence, enter the house, and exit shortly thereafter with a small paper sack.[352] The police checked Del Castillo's probation records and found Alberto Leon's name as his employer. It was discovered that Leon had been arrested in 1980 for a drug charge. Additionally, a companion of Leon's at the time, "informed the police that Leon was heavily involved in the importation of drugs into the United States."[353] Moreover, a different informant had previously informed the police that Leon stored a large quantity of methaqualone at his residence. With this information, the police applied for a warrant to search, among other sights, the home at 620 Price Drive and Leon's home.[354]

The search warrant was approved by a State Superior Court Judge and the search produced quantities of drugs at both residences. After his indictment, Leon filed a motion to suppress the evidence based upon an insufficient warrant. The District Court concluded, after a hearing, that the affidavit for the search warrant lacked probable cause. The District Court, however, found that the officer who prepared the warrant acted in reasonable good faith.[355] Despite this finding, the District Court denied the government's suggestion that the exclusionary rule should not apply where a police officer acts in reasonable reliance upon a search warrant. The Court of Appeals for the Ninth Circuit affirmed the District Court's finding and held that the affidavit was insufficient.[356] A divided Ninth Circuit found that the basis of knowledge and veracity of the informant prongs were not met, and accordingly affirmed the suppression of the evidence under both prongs of the two-part test established in *Aguilar v. Texas* and *Spinelli v. United*

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[352] *Id.*
[353] *Id.*
[354] *Id.* at 902.
[355] *Id.* at 904.
[356] *Id.*

States.[357] The Ninth Circuit declined to adopt the government's position of a good faith exception to the exclusionary rule. The Office of the Solicitor General filed a petition for certiorari on behalf of the United States but did not contest the Ninth Circuit's finding that the search warrant was unsupported by probable cause, even though they could have argued that proposition under the *Gates*, "totality of the circumstances" test. The Government's position was that a good faith exception to the exclusionary rule should be adopted.

The Court granted certiorari to consider the exception to the exclusionary rule,[358] the Court found that, "[a]lthough it undoubtedly is within our power to consider the question whether probable cause existed under the 'totality of the circumstances' test announced last term in *Illinois v. Gates*, that question has not been briefed or argued . . . ."[359] Justice White, writing for the Court's majority concluded that a good faith exception to the exclusionary rule, where a police officer acts in reasonable reliance upon an executed search warrant, should be adopted. The Court stated that, "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the

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[357] *See supra* notes 168-197 and accompanying text. It is interesting to note that Justice Anthony Kennedy, who was on the Ninth Circuit, joined the dissenters in the *Leon* opinion. *See* United States v. Leon, No. 82-1093 (9th Cir. Jan, 19, 1983) (unpublished). A number of press accounts have mischaracterized Kennedy's dissent in Leon. *See, e.g.*, Al Karmen and Ruth Marcus, "Record Contrasts With Bork's; Kennedy Appears Less Ideologically Driven," The Wash. Post, Nov. 9, 1987, at A1 (stating, in a front page article, that Kennedy's "staunch law and order credentials . . . are demonstrated by his dissent in a 1983 case involving the Exclusionary Rule . . . . Kennedy urged that judge allow such evidence to be used if the police act in 'good faith.'"). It should be made clear that Justice Kennedy did not create, or even endorse, the good faith exception to the exclusionary rule in his dissent in *Leon*. In his dissent, Justice Kennedy did not find it necessary to discuss any exception to the exclusionary rule because he found the search warrant in question to be valid under the Fourth Amendment.

[358] 463 U.S. 1206 (1983).

[359] United States v. Leon, 468 U.S. 897, 905 (1984) (citation omitted).

substantial costs of exclusion."[360] Thus, the rationale for the Court's new exception to the Fourth Amendment's exclusionary rule was that suppressing evidence, seized by police in objective good faith reliance on a warrant mistakenly issued by a judge, did not deter police misconduct.

The Court's decision drew a sharp dissent from Justices Brennan and Marshall. Justice Brennan wrote that:

> [i]t now appears that the Court's victory over the Fourth Amendment is complete. That today's decisions represent the piece de resistance of the Court's past efforts cannot be doubted, for today the Court sanctions the use in the prosecution's case-in-chief of illegally obtained evidence against the individual whose rights have been violated - a result that had previously been thought to be foreclosed.[361]

In 1985, the Court of Appeals in *People v. Bigelow*[362] refused to adopt the good faith exception. The court in one sentence concluded that, "[w]e therefore decline, on State constitutional grounds, to apply the good-faith exception . . . ."[363] In *Bigelow*, police were informed that Bigelow "telegraphed almost $25,000 to a Florida resident over a four-month period."[364] The residence where the money was wired was known as a high-drug area.[365] In addition, Bigelow had two different post-office boxes in two different cities in New York where he received a total of three packages from Florida.[366] Moreover, the police knew that Bigelow frequently visited an apartment that was occupied by an individual who was a known drug user and dealer. The police observed Bigelow at a post office box retrieve a package from Florida. Bigelow then proceeded directly to the apartment of the known drug dealer.[367] The police spoke with an informant, while

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[360] *Id.* at 922.
[361] *Id.* at 929 (Brennan, J., dissenting).
[362] 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985).
[363] *Id.* at 427, 488 N.E.2d at 458, 497 N.Y.S.2d at 637.
[364] *Id.* at 421, 488 N.E.2d at 453, 497 N.Y.S.2d at 633.
[365] *Id.* at 421, 488 N.E.2d at 454, 497 N.Y.S.2d at 633.
[366] *Id.*
[367] *Id.*

maintaining surveillance of the apartment. The informant told the officers that Bigelow was:

> a drugger who had arrived in the Arcade area from Florida during the Summer of 1981, that he had no job but plenty of money, that he was dealing in cocaine shipped from Florida and that he had a close relative in Florida. The informant told the police that the defendant had conducted drug transactions as recently as 'Christmas week of 1981.'[368]

Shortly thereafter, the police obtained a search warrant from a local County Judge. After Bigelow left the drug dealer's apartment, the officers pulled over his car.[369] Bigelow was frisked and read his Miranda rights. He was then taken to the police station and his automobile was impounded and searched pursuant to the search warrant.[370] The police found amphetamines, hypodermic needles and over $4,500 in cash.[371] Bigelow was formally arrested.

Bigelow filed a motion to suppress, which was denied by the trial court. Thereafter, Bigelow pleaded guilty. Bigelow appealed the trial court's decision on the ground that the search warrant was not supported by probable cause. The People asserted that the warrant was supported by probable cause under the *Aguilar-Spinelli* two prong test. Alternatively, the People argued that the search warrant was supported by probable cause under the Supreme Court's recently adopted "totality of the circumstances" test enunciated in *Illinois v. Gates*.[372] Finally, the People argued that even if the search warrant lacked probable cause under both the two prong and "totality of the circumstances" tests, the police acted in objective good faith when executing the warrant, and therefore, the Supreme Court's good faith exception to the exclusionary rule should apply.

The New York Court of Appeals found that the search warrant lacked probable cause under both rationales and held that

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[368] *Id.*

[369] *Id.* at 422, 488 N.E.2d at 454, 497 N.Y.S.2d at 633.

[370] *Id.*

[371] *Id.*

[372] 462 U.S. 213 (1983).

"exclusion cannot be avoided because, as a matter of State constitutional law, we decline to apply the *Leon* good-faith standard."[373] Not only did the Court of Appeals decline to adopt the good faith exception to the exclusionary rule, the Court of Appeals also refused to adopt the "totality of the circumstances" test when determining probable cause. The court found that, "New York's present law applies the *Aguilar-Spinelli* rule for evaluating secondhand information and holds that if probable cause is based on hearsay statements, the police must establish that the informant had some basis for the knowledge he transmitted to them and that he was reliable."[374] The court found that the People failed to satisfy the "basis of knowledge" prong of the test because the informant's information did not sufficiently describe Bigelow's activities.[375] After finding that the search warrant lacked probable cause, the Court of Appeals dismissed the People's contention that the good faith exception to the exclusionary rule should apply. The Court of Appeals disagreed with the Supreme Court's underlying rationale that police misconduct cannot be deterred where the police act in objective good faith reliance on a warrant issued by a judge that is later deemed to lack probable cause. The court argued that:

> [I]f the People are permitted to use the seized evidence, the exclusionary rule's purpose is completely frustrated, a premium is placed on the illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future.[376]

The Court of Appeals summarily decided that adoption of the good faith exception would add a "positive incentive . . . to others to engage in similar lawless acts in the future."[377] This line of reasoning is inconsistent when the good faith exception applies only where the police act in objective good faith. As the Supreme Court

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[373] 66 N.Y.2d at 422, 488 N.E.2d at 455, 497 N.Y.S.2d at 634.
[374] *Id.* at 423, 488 N.E.2d at 455, 497 N.Y.S.2d at 634 (citations omitted).
[375] *Id.* at 424, 488 N.E.2d at 455, 497 N.Y.S.2d at 635.
[376] *Id.* at 427, 488 N.E.2d at 458, 497 N.Y.S.2d at 637 (citation omitted).
[377] *Id.*

stated in *Stone v. Powell*,[378] where a police officer's conduct is objectively reasonable,

> excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.[379]

When a police officer acts in objective good faith that a search warrant is properly prepared and has probable cause, there is nothing to deter.

CONCLUSION

Although Article I, § 12 of the New York State Constitution and the Fourth Amendment to the United States Constitution are identical, this article has demonstrated that both sections have been interpreted dramatically different by the New York Court of Appeals and the United States Supreme Court. The Court of Appeals, basing their decisions on "independent state grounds," has consistently interpreted the search and seizure area of criminal procedure in a manner that hinders the likelihood that criminal will be caught, and furthermore undermines the prospect of successful prosecution. The Court of Appeals has broadened what constitutes a search or seizure before Article I, § 12 protections are triggered. It has declined to adopt the totality of the circumstance's test when discerning when a search warrant has probable cause. It has made it more difficult for law enforcement officials to obtain a search warrant for materials presumptively protected by the First Amendment. It has made the area of automobile searches and seizures a complex web of ambiguous rules and regulations which ultimately has led to a decreased ability to undercover ongoing criminal activity. It has

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[378] 428 U.S. 465 (1983).

[379] *Id.* at 539-40 (White, J., dissenting).

decreased the likelihood that police will obtain a permissible statement from a suspect who is arrested in his home. It has made it more difficult to search closely regulated businesses such as junkyards that sell stolen automobiles. Finally, it has declined to adopt the good-faith exception to the exclusionary rule. While the New York Court of Appeals continues to maintain that its actions protect all New Yorkers, their recent decisions mean that New York police officers, detectives, investigators, and prosecutors perform their law enforcement obligations under a set of complex rules antithetical to the United States Government that undoubtedly decrease the prospect criminals will be caught and successfully prosecuted.